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No. (1)

IN THE
Supreme Court of the United States

DONALD A. THACKER, TRUSTEE,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

This case arises from the same FCC auction and credit program addressed by this Court and the D.C. Circuit in *NextWave Personal Communications Inc. v. FCC*, 254 F.3d 130, 151 (D.C. Cir. 2001), *aff'd*, 537 U.S. 293 (2003). Acting as a secured creditor, the FCC financed the purchase of exclusive licenses by petitioner Magnacom, took security interests in the licenses as collateral to protect itself as creditor, then disposed of its collateral by canceling the licenses and reselling the same rights to others when Magnacom could not repay its loan. The question presented is:

Whether the Ninth Circuit erred in ruling – contrary to *NextWave* – that the FCC's roles as regulator and creditor are mutually exclusive and that use of its regulatory power to cancel licenses was not an act to enforce its security interest, thereby permitting the FCC to circumvent Magnacom's unwaivable right to receive the surplus proceeds from the license reauction under the creditor-debtor law that binds federal agencies?

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Petitioner is Donald A. Thacker, in his capacity as Trustee of the bankruptcy estate of Magnacom Wireless, LLC. Magnacom Wireless, LLC is owned by two privately held companies, The Whalebone Group, LLC, and Pacwest Networks, Inc., neither of which issues shares to the public.

Respondents are the Federal Communications Commission and the United States of America.

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OPINIONS BELOW

The Ninth Circuit's opinion is reported at 503 F.3d 584 and is reprinted at Pet. App. 1a-23a. The order of the District Court is unreported and is reprinted at Pet. App. 45a-57a. The order of the Bankruptcy Court is unreported and is reprinted at Pet. App. 24a-44a.

JURISDICTION

The Ninth Circuit's decision and judgment were filed on September 17, 2007. This petition is timely filed on December 14, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This case involves the interaction of federal statutes (the Bankruptcy Code and Communications Act), an FCC regulation (47 C.F.R. § 1.2110(g)(4)(iv)), and Article 9 of the Uniform Commercial Code, which applies here as federal common law because the FCC assumed the role of secured creditor. The relevant provisions are set out in the appendix at Pet. App. 69a.

STATEMENT OF THE CASE

This case arises from the same FCC program and auctions considered by this Court and the D.C. Circuit in *NextWave Personal Communications Inc. v. FCC*, 254 F.3d 130, 151 (D.C. Cir. 2001), *aff'd*, 537 U.S. 293 (2003) – but with startlingly different results. Under this FCC program, the agency wears "two hats – that of regulator and creditor." Pet. App.

39a. The issue is whether the FCC may use its status as regulator to circumvent its obligations as creditor under long-established federal law. In stark tension with *NextWave*, the Ninth Circuit allowed just that. The Ninth Circuit reasoned that when the FCC acts as a creditor in the market it regulates and then uses its regulatory authority to repossess collateral for failure to debt, it can effectively bypass the obligations that otherwise attach to every federal agency under settled federal debtor-creditor law. The Ninth Circuit thus held that the FCC's regulatory power is entirely "separate and independent" from its creditor status and exempts it from the obligations of a secured creditor. Pet. App. 19a.

The Ninth Circuit's either/or logic – the FCC acts *either* as a regulator *or* as a creditor, not simultaneously as both – is contrary to *NextWave* and to settled federal law governing federal agencies that choose to act as creditors in the market. It is in direct conflict with the D.C. Circuit's specific holding in *NextWave* that when the FCC cancels licenses in response to nonpayment under the very regulation at issue here, the cancellation is *both* a regulatory act *and* enforcement of the agency's security interest. Indeed, the Ninth Circuit went out of its way to disparage Judge Tatel's opinion on this point as not being the D.C. Circuit's "reasoned conclusion." Pet. App. 16a. In addition, the Ninth Circuit's reasoning is contrary to this Court's *NextWave* decision, which affirmed the D.C. Circuit and likewise rejected the either/or approach, because "a debt is a debt, even when the obligation to pay it is also a regulatory

condition." *FCC v. NextWave Personal Commc'ns*, 537 U.S. 293, 303 (2003). Finally, the Ninth Circuit's reasoning upends well-established federal law holding that *all* federal agencies are subject to the uniform and predictable debtor-creditor law that applies to other market actors – and upon which private actors justifiably rely in structuring their transactions in the market that the agency regulates.

As the FCC itself urged when it sought and obtained this Court's review in *NextWave*, the orderly administration of hybrid regulatory and credit programs like that here requires legal certainty – for private parties who rely on settled commercial law when they make their investments as well as for the agency. Every federal agency that extends credit subject to security interests does so in furtherance of a broader regulatory agenda. But the Ninth Circuit's decision lets a federal agency switch back and forth between "separate and independent" regulatory and creditor roles according to its immediate pecuniary advantage, thereby undermining the certainty that is otherwise provided by commercial law. The FCC's actions here provide a stark example of such gamesmanship to the agency's advantage – and to the detriment of a debtor's investors and other creditors. Given the direct split with the D.C. Circuit's decision in *NextWave*, and the palpable tension with this Court's decision in *NextWave* and with other cases requiring federal agencies to comply with uniform debtor-creditor law, the Ninth Circuit's opinion calls for review by this Court.

Factual Background

1. The FCC credit and auction program at issue here is described at length in the D.C. Circuit's and this Court's *NextWave* opinions. Briefly, in § 309(j) of the Communications Act, Congress directed the FCC to use auctions ("competitive bidding") to assign new radio spectrum licenses. 47 U.S.C. § 309(j)(1). Congress also directed the FCC to design its auction mechanisms to "disseminat[e] licenses among a wide variety of applicants, including small businesses," *id.* § 309(j)(3)(B), and to "consider alternative payment schedules and methods of calculation, including lump sums or guaranteed installment payment . . . or other schedules or methods," *id.* § 309(j)(4)(A).

The FCC chose to implement these broad statutory directives by limiting auctions for some licenses to small or entrepreneurial businesses ("designated entities") and to allow such businesses to pay for their licenses through installment payments. 47 C.F.R. § 24.709(a)(1) (1997). The FCC thereby chose to become a creditor financing the purchase of licenses by the small businesses it was supposed to aid.

Consistent with its creditor position, the FCC required winning bidders who used installment payments to execute security agreements granting the FCC "a first lien on and continuing security interest in all of the Debtor's rights and interest in the License[s] and all proceeds, profits and products of any sale of or other disposition thereof (collectively, the 'Collateral')." Pet. App. 80a; *see* 47 C.F.R. § 1.2110(g)(3).

The FCC's security agreement defines a debtor-licensee's failure to pay its debt to the FCC as an event of default under the security agreement and specifies several remedies the FCC has for such default under the agreement. Pet. App. 87a-88a. First among these FCC remedies under the security agreement is that the debtor's "License shall be automatically canceled pursuant to 47 C.F.R. § 1.2110." Pet. App. 88a; *see* 47 C.F.R. § 1.2110(g)(4)(iv) (providing that when a debtor-licensee does not make timely payments on its installment notes, "it shall be in default, its license shall automatically cancel, and it will be subject to debt collection procedures"). The security agreement also purports to waive the debtor-licensee's right to proceeds from the resale of its license rights in the event the FCC exercises its right under the security agreement to proceed against its collateral – the licenses – by cancelling them. Pet. App. 88a-89a.

As this Court explained in *NextWave*, the FCC's decisions to finance licenses through installment payment plans and – more importantly – to cancel licenses in the event of repayment default are not choices dictated by Congress, but represent mere "policy preferences on the FCC's part." 537 U.S. at 304. "[N]othing in [§ 309(j)] demands that cancellation be the sanction for failure to make agreed-upon periodic payments. Indeed, nothing in those provisions even requires the Commission to permit payment to be made over time, rather than leaving it to impecunious bidders to finance the full purchase price with private lenders." *Id.*

In short, the FCC chose to carry out its regulatory mission by assuming the role of a secured creditor, financing the purchase of licenses, requiring security agreements as protection for its position as creditor, and making regulatory cancellation of the licenses a remedy for enforcing those security interests in the event the debtor-licensee defaulted on its loan.

2. In the late 1990s, the FCC sold 18 licenses for exclusive use of specific radio spectrum for personal communications services to Magnacom Wireless, LLC, a designated entity eligible for secured financing from the FCC. Magnacom was awarded these licenses in the exact same C- and F-Block auctions that were at issue in *NextWave*. *See* 537 U.S. at 296; Pet App. 3a. Each of the licenses gave Magnacom the exclusive right to use a unique segment of the radio spectrum in a specific geographic area. As long as Magnacom held its licenses, the FCC could not license any other company to use those airwaves in those localities.

To purchase its licenses, Magnacom made down payments of about $7 million and executed the FCC-required installment plan notes and security agreements for the rest of the purchase price, approximately $48 million. A representative security agreement is included at Pet. App. 79a-94a.

After Magnacom bought its licenses, made its down payments, and executed the secured loan documents required by the FCC – but before its first installment payment was due – the bottom fell out of the spectrum market. Virtually every C-Block and F-Block debtor-licensee, including both NextWave

and Magnacom, was forced into bankruptcy or defaulted on its loans when it could not raise the money needed to repay the FCC. Like NextWave, Magnacom filed for Chapter 11 bankruptcy protection just before going into default on its FCC installment payments.[1]

3. After Magnacom was forced into bankruptcy, the FCC filed a motion in the bankruptcy court for an order lifting the automatic stay, *see* 11 U.S.C. § 362, so that the FCC could cancel Magnacom's licenses under its rule providing for automatic cancellation of licenses when the debtor-licensee defaults on its installment payments, 47 C.F.R. § 1.2110(g)(4)(iv). As previously noted, cancellation under that very rule is the FCC's primary remedy as a secured creditor for default under the security agreement and installment notes. *Supra* at 5; Pet. App. 87a-88a.

As a result of the market downturn, Magnacom was left without equity in its licenses when it filed for bankruptcy, *i.e.*, its secured debt to the FCC exceeded the licenses' current value.[2] Magnacom

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[1] The FCC's own Chairman chastised the agency for failing to reasonably accommodate debtor-licensees like Magnacom during this temporary market downturn, thereby creating "a substantial risk of bankruptcies that Congress and any commercially reasonable enterprise would have us eliminate." Separate Statement of Chairman Reed E. Hundt, *In re Amendment of the Comm'n's Rules Regarding Installment Payment Fin. for Pers. Commc'ns Servs. (PCS) Licensees*, 12 F.C.C.R. 16,436 (1997).

[2] The same was true at the initial stages of NextWave's bankruptcy. At that time, NextWave's licenses were worth less

therefore consented to an order lifting the automatic stay under Bankruptcy Code provisions that allow undersecured creditors like the FCC to enforce their security interests. *See* 11 U.S.C. § 362(d)(1), (2). Magnacom also consented to specific language proposed by the FCC that expressly allowed the agency to exercise its right to enforce its interests through cancellation of the licenses.

Magnacom's consent was predicated on the FCC's representation that lifting the stay to allow it to proceed by cancellation would be "economically neutral for the government fisc and certainly confers no economic advantage to the government over third parties in relation to the Debtor's estate." E.R. 102.[3] The bankruptcy court therefore entered the FCC's proposed lift-stay order, specifically citing the court's authority to lift the stay under § 362(d)(1), (2) – provisions that allow undersecured creditors to enforce their security interests. E.R. 78. The order lifted the automatic stay to allow "the FCC [to] pursue immediately any and all of its remedies, including its right to cancel the Defaulted Licenses if such licenses have not already canceled as a matter of law." Pet. App. 6a, 59a.[4]

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than one-fourth what NextWave owed the FCC for them. *See* 537 U.S. at 298.

[3] "E.R" denotes Appellants' Excerpts of Record filed in the Ninth Circuit below.

[4] Two months later, Magnacom's bankruptcy was converted from a Chapter 11 reorganization to a Chapter 7 liquidation.

4. After the stay was lifted and the FCC exercised its remedy of automatically canceling Magnacom's licenses – but before it disposed of those license rights in a subsequent auction – the FCC filed a proof of claim in Magnacom's bankruptcy for the entire $48 million Magnacom owed for the licenses. As the FCC subsequently explained, it filed this proof of claim to protect its right to recover "any *deficiency* amount between the amount owed by Magnacom and the amounts bid at a subsequent auction" for the license rights. FCC Br. (9th Cir.) at 10 n.5 (emphasis added). In other words, the FCC acted like any other secured creditor in asserting a deficiency claim for the shortfall in the value of its collateral compared to the amount of the debt it secured. The bankruptcy court allowed the FCC's claim. Pet. App. 6a, 60a.

The FCC then waited out the market downturn in license values before reauctioning the exclusive spectrum rights it had taken back from Magnacom. Once spectrum values rebounded, the FCC resold Magnacom's former license rights in the very same auction, subject to the same terms, in which it reauctioned NextWave's licenses, which it had also previously cancelled. Not surprisingly, then, the FCC received the same windfall from canceling and reselling Magnacom's licenses as it initially obtained from NextWave's – an enormous increase in values not only above the extremely depressed market prices that had forced Magnacom and NextWave into bankruptcy, but even far above the values that prevailed before the market downturn, when Magnacom and NextWave originally invested in the

licenses.[5] In Magnacom's case, although it owed the FCC only $48 million for the licenses (on top of the $7 million in down payments it had already made), the FCC reauctioned the exclusive rights to use the same spectrum for $287 million. Pet. App. 7a.

5. In light of the reauction, the Trustee of Magnacom's bankruptcy estate and certain creditors moved in the bankruptcy court for reconsideration and disallowance of the FCC's $48 million deficiency claim, on the ground that Magnacom's debt to the FCC had been fully satisfied by the proceeds from the reauctioned licenses. The FCC vigorously opposed disallowance of its claim. Pet. App. 60a. It argued that Magnacom had no interest in the proceeds from the reauction, because cancellation had eliminated any interest it had in the spectrum rights and the FCC had auctioned entirely new licenses unrelated to Magnacom's. Pet. App. 64a.

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[5] Because NextWave contested the cancellation of its licenses, the FCC reauctioned those license rights subject to NextWave's prior rights if its lawsuit succeeded. *See C and F Block Broadband PCS Spectrum Auction Scheduled for December 12, 2000*, 15 F.C.C.R. 19,485, 19,493 (2000). When NextWave prevailed, the FCC had to cancel the award of the licenses to the winning bidders in the reauction of NextWave's licenses in order to restore them to NextWave. *See In re Disposition of Down Payment & Pending Applications by Certain Winning Bidders in Auction No. 35*, 17 F.C.C.R. 23,354, 23,359-62 (2002). As this sequence of events shows, the FCC could dispose of these *exclusive* rights only by repossessing them from the original licensee through cancellation or some other means. And when the licenses were restored to NextWave, it (rather than the FCC) benefited from the license's appreciation in value above the amount of NextWave's debt to the agency.

The bankruptcy court rejected the FCC's arguments. "The Court is unconvinced by the FCC's argument that the claim may not be reconsidered because the licenses that it subsequently auctioned were different licenses than the ones previously held by the Debtor. . . . No matter how labeled, . . . the FCC could not have auctioned these licenses to new users, *but for* the Debtor's default." Pet. App. 64a. Accordingly, "the FCC's claim against the Debtor's estate" was "satisfied" by the reauction proceeds. *Id.* Continuing to allow the claim would improperly permit the agency "to collect from the debtor twice." *Id.* 65a. The court therefore disallowed the FCC's claim. *Id.* 67a-68a. The FCC did not appeal that ruling.

Proceedings Below

The Trustee, acting on behalf of the bankruptcy estate, then commenced this adversary proceeding against the FCC to recover the *surplus* proceeds from the license reauction, of which $239 million remained after $48 million was used to pay off Magnacom's debt to the FCC. The bankruptcy court's jurisdiction arose under 28 U.S.C. §§ 157 and 1334.[6]

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[6] Sovereign immunity does not bar the Trustee's adversary claim. Congress has waived the United States' sovereign immunity where – as here – the Government itself files a proof of claim in a bankruptcy case and the claim asserted against the Government belongs to the bankruptcy estate and arises out of "the same transaction or occurrence" as the United States' own claim. 11 U.S.C. § 106(b). Accordingly, the FCC has never asserted a sovereign immunity defense to the Trustee's adversary proceeding. Indeed, the Government

The Trustee's primary claim (the one at issue here) is that under well-established law that applies to federal agencies when they assume the role of a secured creditor, Magnacom has an unwaivable right to the surplus proceeds that resulted when the FCC disposed of its collateral – the licenses – by canceling them and reselling the same exclusive rights to others solely because Magnacom was forced to default on its debt. Under *United States v. Kimbell Foods, Inc.*, 440 U.S. 715 (1979), when a federal agency assumes the role of "a voluntary commercial lender," "federal law" governs the relationship between the government and the private debtor. *Id.* at 722, 726.[7] But in the absence of any statute or extraordinary circumstances requiring another rule, federal law must "adopt state law," *id.* at 728-29 – particularly where, as with secured transactions, the U.C.C. provides a *uniform* body of law adopted by nationwide, *id.* at 732 n.28. U.C.C. Article 9 therefore applies here as federal law. And Article 9 mandates that whenever, "[a]fter default, a secured party [chooses to] sell, lease, license, or otherwise dispose of any or all of the collateral," "the secured party *shall account to and pay a debtor for any surplus*." U.C.C. §§ 9-610(a), 9-615(d)(1) (Wash. Rev. Code 62A.9A-610(a), -615(d)(1)). Article 9 also provides that the debtor's right to the surplus proceeds *cannot be waived*. U.C.C. § 9-602(5) (Wash. Rev. Code § 62A.9A-602). These provisions are

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has consistently sought and obtained rulings on the merits of the Trustee's claim.

[7] The security agreements here also provide that they are governed by "federal law." Pet. App. 92a.

intended to protect debtors in the very circumstances here – where a secured creditor takes advantage of a temporary market downturn, seizes collateral from a distressed debtor who cannot make payments, waits out the depressed market, and then sells the collateral after the market recovers for a windfall above the amount of the debt that was secured by the collateral.

The Trustee also asserted a separate claim directly under the Bankruptcy Code, on the theory that the licenses and their proceeds represent "property of the bankruptcy estate." Pet. App. 13a. Finally, the Trustee argued that although the bankruptcy court's earlier order disallowing the FCC's proof of claim had not decided the Trustee's *claim* for the surplus, it had decided the *issue* of whether the reauction proceeds were traceable to Magnacom's licenses – "the FCC could not have auctioned these licenses to new users, *but for* the Debtor's default", Pet. App. 64a – so that issue preclusion barred the FCC from relitigating that specific issue.

The FCC moved to dismiss the Trustee's complaint. In ruling on the motion, the bankruptcy court recognized that under the agency's auction and loan program, "the FCC is wearing two hats – that of regulator and creditor." Pet. App. 39a. The court also recognized that "nothing in the Federal Communications Act (FCA) or FCC regulations governs this issue [of entitlement to the surplus proceeds], allowing this Court to look to the UCC for guidance in determining federal common law," and that "despite the express waiver contained in

paragraph 8(d) of the Security Agreements, the Debtor possesses an unwaivable interest in the proceeds under the UCC." Pet. App. 38a. Therefore, if the FCC was acting as a secured creditor (as well as a regulator) when canceling the licenses solely because Magnacom could not pay its debts, the Trustee would have a valid claim to the surplus.

Nonetheless, the bankruptcy court granted the FCC's motion to dismiss, on the ground that the FCC chose to act as a regulator rather than a creditor in response to Magnacom's default on its debt:

> When the Debtor filed [for] bankruptcy and defaulted on its payment obligations to the FCC, the FCC had two options available. It could either act as a secured creditor and seek to enforce its security interest (in which case the UCC would likely apply and the Debtor would retain an interest in the proceeds), or act as regulator and cancel the licenses. The FCC chose the second option.

Pet. App. 40a. In other words, the FCC could pick and choose whether to wear its regulator or creditor "hat" according to its immediate interest at any given time. By choosing to act as a regulator in this instance, it circumvented its obligation as creditor to account to the debtor for surplus proceeds.[8] The district court affirmed. Pet. App. 57a.

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[8] The bankruptcy court also ruled that its order disallowing the FCC's proof of claim was without *issue* preclusive effect, because the court's earlier order reserved judgment on the Trustee's *claim* to the surplus. Pet. App. 31a-

On further appeal, the Ninth Circuit also affirmed. It first rejected the claim asserted by the Trustee under the Bankruptcy Code. The court of appeals reasoned that under the Communications Act, the FCC's cancellation of Magnacom's licenses terminated Magnacom's interest in the licenses and the underlying spectrum, and that therefore "the proceeds from the auction of the new licenses were not property of the bankruptcy estate." Pet. App. 8a; *see also id.* at 13a-14a.

The Ninth Circuit then turned to the Trustee's claim under federal common law incorporating the U.C.C. and rejected that claim under the same rationale as the bankruptcy court. The court assumed *arguendo* that the U.C.C. governs the FCC's security agreements, and observed that "the UCC would support the trustee's claim of entitlement to proceeds from the FCC's sale of new licenses only if the FCC's cancellation of [Magnacom's] licenses was a lien-enforcement remedy under the UCC." Pet. App. 15a. Like the bankruptcy court, however, the Ninth Circuit held that the FCC was free to choose whether to act as a creditor or instead purely as a regulator when canceling Magnacom's licenses in response to Magnacom's default on its debt:

> The FCC had a regulatory and contractual right to cancel Magnacom's licenses. This right was separate and independent from the FCC's rights as a secured creditor. Nothing in

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32a. That preclusion ruling was affirmed by the district court and the Ninth Circuit. *Id.* 51a-52a, 22a-23a.

> the Security Agreement or the applicable regulations indicates that a license cancellation must be viewed as a lien-enforcement remedy, and we decline to do so. *Because the FCC's license cancellation is not a UCC lien-enforcement remedy, the UCC's requirements are simply inapplicable.*

Pet. App. 19a (emphasis added).

In support of this ruling, the Ninth Circuit first stated, inexplicably, that "the Security Agreement does not make cancellation a lien-enforcement remedy." Pet. App. 15a. In fact, the security agreement defines an "Event of Default" as a "default under this Agreement," and provides that "[i]f an Event of Default shall occur, the Commission shall thereafter have the following rights and remedies . . . : the License[s] shall be automatically canceled pursuant to 47 C.F.R. § 1.2110." Pet. App. 87a-88a. Thus, the security agreement *does* "make cancellation a lien-enforcement remedy." That should not be surprising, given that the event that triggers cancellation is default on the very debt that is secured by the licenses as collateral.

The Ninth Circuit also rejected the D.C. Circuit's ruling in *NextWave*, 254 F.3d at 151, that regulatory cancellation under precisely these circumstances is *also simultaneously* an act to enforce the FCC's lien or security interest. The Ninth Circuit disparaged the D.C. Circuit's holding as a "statement[] made in passing, without analysis," in response to a "highly technical argument," and said that it would "not consider [*NextWave*'s] brief discussion to be the D.C.

Circuit's reasoned conclusion that cancellation of an FCC license is a lien-enforcement action." Pet. App. 16a-17a. The Ninth Circuit also declined to follow the D.C. Circuit on this issue because the latter court's opinion had been "superceded" by this Court's *NextWave* decision – which *affirmed* the D.C. Circuit – but "which did not address the question whether license cancellation constituted lien enforcement." *Id.* 17a.

REASONS FOR GRANTING THE WRIT

The Ninth Circuit allowed the FCC to use its regulatory authority to circumvent obligations that otherwise attach under federal law when an agency acts as a creditor. That ruling represents an acknowledged, specific, and outcome-determinative split with the D.C. Circuit's decision in *NextWave*. It also conflicts with this Court's *NextWave* decision, which rejected the dichotomy between regulatory and creditor actions that has now been resurrected by the Ninth Circuit here. Most fundamentally, the Ninth Circuit's ruling would free every federal agency that acts as a creditor from the constraints of federal creditor-debtor law whenever it invokes a regulatory motive or power for its creditor actions. For each of these reasons, the Ninth Circuit's ruling should be reviewed by this Court.

1. In *NextWave*, the D.C. Circuit specifically held that the FCC's cancellation of licenses under circumstances identical to those here is *both* a regulatory act *and* a creditor action to enforce the agency's security interest. The Ninth Circuit held just the opposite – that the cancellation was a purely

regulatory and not also a lien enforcement action. The Ninth Circuit acknowledged that circuit split, and it was outcome-determinative.

2. The Ninth Circuit ruling is also contrary to this Court's decision in *NextWave* that the FCC cannot exploit its regulatory status to evade creditor-protection laws. In *NextWave* the Court made clear that the FCC's roles as a regulator and creditor are inextricably intertwined in the program at issue here. Thus, the Court *rejected* the FCC's contention that because it had regulatory motives and was enforcing regulatory conditions, it had not canceled NextWave's licenses solely because NextWave did not pay its debts to the agency. The Court thereby rejected the FCC's dichotomy between its regulatory and creditor roles. But the Ninth Circuit accepted the FCC's invitation to resurrect the regulator-creditor dichotomy here, ruling that these roles are "separate and independent" and that one and the same act cannot be both the exercise of a regulatory power and enforcement of creditor rights.

3. Most fundamentally, the Ninth Circuit's ruling allows the FCC or any other federal agency to freely switch back and forth between distinct roles as regulator and market participant in pursuit of its immediate fiscal advantage. Agencies often act both as regulators and as creditors in a single administrative program, but (absent specific directives from Congress to the contrary) they have always been bound by federal debtor-creditor law like any other creditor under this Court's precedent in *United States v. Kimbell Foods, Inc.*, 440 U.S. 715 (1979). That uniform application of commercial law

provides the certainty that is necessary for structuring everyday commercial relationships in regulated markets. But the Ninth Circuit now allows any agency to exempt itself from the constraints that apply to other creditors whenever doing so is in the agency's immediate pecuniary interest, by the simple expedient of invoking "separate and independent" regulatory motives and powers. The concern that an agency might try to exploit its dual roles is hardly speculative – in this case, as in *NextWave*, the FCC proceeded like any other secured creditor until an upturn in the market made it more attractive to label its actions "regulatory." Although this Court refused to allow such conduct in *NextWave*, the Ninth Circuit condoned and even applauded it here.

I. The Ninth Circuit's Decision Is in Direct Conflict with the D.C. Circuit's Ruling in *NextWave*.

In Judge Tatel's carefully reasoned opinion in *NextWave*, the D.C. Circuit expressly held that the FCC's automatic cancellation of licenses under circumstances identical to those here is *both* a regulatory act *and simultaneously* an action to enforce the FCC's security interest in the licenses. 254 F.3d at 151. The FCC canceled NextWave's licenses under 47 C.F.R. §1.2110(g)(4)(iv) – the same automatic cancellation rule it invoked here – because NextWave (like Magnacom) could not make its installment payments on the licenses after it was forced into bankruptcy. 254 F.3d at 138, 149-50; *see also* 537 U.S. at 298. NextWave challenged the cancellation under 11 U.S.C. § 525(a), which bars the

Government from revoking licenses of a bankruptcy debtor solely because the debtor has not paid a dischargeable debt. In response, the FCC and its supporting intervenors vigorously argued that § 525 should not be construed to reach the FCC's regulatory cancellation, because that would conflict with the Bankruptcy Code's exemption of "regulatory" actions from the scope of the automatic stay, *see* 11 U.S.C. § 362(b)(4). The FCC contended that if the § 362 automatic stay permitted the FCC to exercise its regulatory power to cancel licenses for nonpayment, then § 525 could not be construed to prohibit the same thing. *See* 254 F.3d at 150.

The D.C. Circuit rejected that argument precisely because the FCC's license cancellation was *both* a regulatory act *and* an "act to create, perfect, or enforce any lien against property of the estate." 11 U.S.C. § 362(a)(4); *see NextWave*, 254 F.3d at 151. In enacting § 362, Congress specifically provided that although most regulatory acts are exempt from the automatic stay, regulatory acts to enforce liens (including consensual security interests) are *not* exempt. 11 U.S.C. § 362(b)(4) (regulatory exception to stay does not extend to lien enforcement actions covered by § 362(a)(4)).[9] Thus, Congress (unlike the Ninth Circuit) fully understood that there is nothing mutually exclusive about regulatory and creditor actions and that a government agency like the FCC

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[9] Under the Bankruptcy Code, the term "lien" encompasses consensual security interests like that here. 11 U.S.C. § 101(37), (51).

might use its regulatory power to enforce a security interest.

In *NextWave* the D.C. Circuit held that the FCC had done exactly that when exercising precisely the same powers it exercised here: using its regulatory powers to enforce its security interest. The court observed that "NextWave [like Magnacom] executed security agreements giving the Commission a 'first lien' on the company's interest in the licenses"; that lien enforcement actions "include self-help remedies against collateral such as repossession"; and that "Commission counsel acknowledged that canceling the licenses and seeking to collect on the debt was 'tantamount . . . to foreclosing on collateral.'" 254 F.3d at 151 (internal quotation marks omitted from second quotation; ellipsis in original). "Thus, contrary to the Commission's argument, and notwithstanding the applicability of the regulatory power exception, section 362's automatic stay *does* apply here" – precisely because the regulatory cancellation was *also* an action to the enforce the FCC's security interest. *Id.* Therefore, the statutory conflict posited by the FCC did not exist. *Id.* ("This is thus not a case in which section 525, if applicable, would bar an action exempt from the automatic stay").

In short, the D.C. Circuit rejected the FCC's automatic stay argument based on an express ruling that regulatory cancellation under these circumstances is *also* an action to enforce the FCC's security interest against the licenses as collateral. In the present case, however, the Ninth Circuit reached the exact opposite result, holding that

cancellation under the same FCC rule, which is triggered by nonpayment of the licensee's secured debt, is a pure regulatory action and not also a lien-enforcement action. Pet. App. 19a ("The FCC had a regulatory . . . right to cancel Magnacom's licenses . . . separate and independent from the FCC's rights as a secured creditor. . . . Because the FCC's license cancellation is not a UCC lien-enforcement remedy, the UCC's requirements are simply inapplicable").

That split in the Ninth and D.C. Circuit's holdings is plainly outcome-determinative in this case. Had the Ninth Circuit followed the D.C. Circuit and held that cancellation was a lien-enforcement remedy, then the U.C.C. would have applied to the FCC's actions, and Magnacom would have an unwaivable right to the surplus proceeds of the collateral. As the bankruptcy court acknowledged, if the FCC were found to be "act[ing] as a secured creditor and seek[ing] to enforce its security interest," then "the UCC would likely apply and [Magnacom] would retain an interest in the proceeds." Pet. App. 40a. The Ninth Circuit tacitly recognized this as well. *Id.* 19a ("Because the FCC's license cancellation is not a UCC lien-enforcement remedy, the UCC's requirements are simply inapplicable"). Indeed, as this Court made clear in *Kimbell Foods*, the U.C.C. applies as federal law binding agencies that act as creditors in the market.

The Ninth Circuit openly acknowledged that it was rejecting the D.C. Circuit's ruling because it disagreed with it. Indeed, the Ninth Circuit even belittled the relevant part of Judge Tatel's opinion as "statements made in passing, without analysis," in

response to a "highly technical argument" from the FCC. Pet. App. 16a-17a. But whether or not the FCC's argument was "highly technical," the D.C. Circuit's treatment of it was analytically rigorous. Nor is this surprising. The applicability of the automatic stay – and, specifically, of the lien enforcement exception to the regulatory exception to the stay – was extensively briefed and argued in the D.C. Circuit in *NextWave*. The Ninth Circuit's assertion that this ruling was not "the D.C. Circuit's reasoned conclusion that cancellation of an FCC license is a lien-enforcement action," Pet. App. 16a, is unsupportable.[10]

If anything, the Ninth Circuit, not the D.C. Circuit, resolved this issue "in passing, without analysis." Ignoring the express terms of the security agreement, the Ninth Circuit asserted, without citation or elaboration, that "the Security Agreement does not make cancellation a lien-enforcement remedy." Pet. App. 15a. In fact, as previously noted, the security agreement expressly states that regulatory cancellation is the agency's primary remedy for default under the agreement itself. *Id.* 87a-88a. Small wonder, then, that earlier in

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[10] Indeed, the D.C. Circuit carefully analyzed an earlier Second Circuit decision in litigation between the FCC and NextWave to determine its preclusive effect with respect to this very issue, and held that the Second Circuit left open the question whether the license cancellation was a lien enforcement action and was therefore stayed regardless of its regulatory character. *NextWave*, 254 F.3d at 148-49. That demonstrates the painstaking care the D.C. Circuit took in addressing this issue.

NextWave the FCC's own counsel conceded that regulatory cancellation under these circumstances is tantamount to foreclosure on collateral. 254 F.3d at 151.[11]

The Ninth Circuit also suggested that the authority of the D.C. Circuit's ruling on this issue was somehow diminished by the fact that this Court's own *NextWave* decision simply "did not address the question whether license cancellation constituted lien enforcement." Pet. App. 17a. But this Court did not vacate or reverse the D.C. Circuit in *NextWave* – it *affirmed* it, without in any way disturbing the court of appeals' ruling on this issue. Certainly, the affirmance by this Court did not reduce the authority of the D.C. Circuit's decision on any issues this Court declined to address.[12]

To be sure, because this Court in *NextWave* did not itself address the precise question of whether the

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[11] The D.C. Circuit also rejected the FCC's automatic stay argument on additional independent grounds. 254 F.3d at 150. But the existence of alternative rationales for a ruling does not diminish the authority of each alternative. "Courts routinely decide cases on multiple grounds, each of which has been fully litigated and given careful consideration due to their potentially dispositive role in the case. . . . [I]t would be curious to conclude that none of these findings were necessary to the judgment . . . ." *Jean Alexander Cosmetics, Inc. v. L'Oreal USA, Inc.*, 458 F.3d 244, 253 (3d Cir. 2006), *cert. denied*, 127 S.Ct. 1878 (2007).

[12] *See, e.g., Sierra Club v. Whitman*, 285 F.3d 63, 68 (D.C. Cir. 2002) (relying on holding by court of appeals on an issue that was not reached by Supreme Court in affirming that decision in *Georgetown University Hospital v. Bowen*, 821 F.2d 750, 756-58 (D.C. Cir. 1987), *aff'd*, 488 U.S. 204 (1988)).

license cancellation was also an act to enforce the FCC's security interest, the Ninth Circuit was not *bound* by precedent on that specific issue. It was therefore free to disagree with the D.C. Circuit, and it did so. Review by this Court is, however, appropriate under just these circumstances.

II. The Ninth Circuit's Rigid Dichotomy Between the FCC's Roles as Regulator and Creditor Is Contrary to this Court's *NextWave* Decision.

Review of the Ninth Circuit's decision is also warranted because its reasoning runs directly counter to this Court's approach in *NextWave*. While the *NextWave* majority did not address the specific issue whether the FCC's regulatory cancellation is also an act to enforce its security interest, the Court did grapple with the overarching question of the relationship between the FCC's roles as regulator and creditor. In both *NextWave* and this case, the FCC's constant argument has been that because its actions have a regulatory aspect, those actions have no creditor dimension and are therefore exempt from creditor-debtor law. In this case, the Ninth Circuit accepted the FCC's either/or framing of the issue and held that because the FCC used its regulatory power to respond to default on a debt to it, the agency was not acting as a creditor and commercial law simply did not apply.

In *NextWave*, however, this Court took just the opposite tack and emphatically rejected the dichotomy that the FCC has attempted to drive between its regulatory and creditor roles. The FCC argued in *NextWave* that it did not violate § 525 by

automatically canceling NextWave's licenses in response to NextWave's default on its installment payments, because NextWave's obligation to pay was not a "debt" as required by § 525. 537 U.S. at 302. According to the FCC, NextWave's payment obligation was not a debt because it was a "regulatory condition" that the FCC imposed as a regulator rather than as a creditor. *Id.* But this Court rejected the FCC's dichotomy out of hand and dismissed the unfounded notion that regulatory powers and obligations cannot coexist with commercial or creditor-debtor relationships. In the Court's pithy formulation, "a debt is a debt, even when the obligation to pay it is also a regulatory condition." *Id.* at 303.

The Court also rejected the FCC's attempt to escape § 525 by smuggling in its regulator-creditor dichotomy in second guise. Even if NextWave's payment obligation was a debt (as well as a regulatory condition), the FCC argued that because it had a "valid regulatory motive" for the cancellation, it had not canceled NextWave's licenses "solely because" of NextWave's nonpayment of its debt. *See* 537 U.S. at 301. The Court again disagreed. The regulatory motive behind the FCC's actions did not change the fact that it canceled NextWave's licenses for failure to pay a debt. *Id.*

The Court's analysis in *NextWave* is fundamentally at odds with the Ninth Circuit's decision in this case, which accepts the FCC's premise that because the FCC's license cancellation has a regulatory dimension, it is *ipso facto* not a creditor action. In *NextWave*, the FCC could not

escape its obligations under federal creditor-debtor law merely because it was acting pursuant to its regulatory powers. But that is precisely what the Ninth Circuit allowed here.

The Ninth Circuit's opinion also cannot be reconciled with *NextWave* insofar as the Ninth Circuit held that Magnacom's unwaivable right to the surplus proceeds was defeated by sections of the Communications Act providing that spectrum licensees hold their licenses subject to conditions imposed by the FCC and have no property interest in the underlying spectrum. *See* Pet. App. 8a-9a. The FCC made the same argument in *NextWave*, contending that § 525 of the Bankruptcy Code would conflict with these same provisions of the Communications Act if the former prohibited the FCC from enforcing the payment condition on the licenses. FCC Br. in *NextWave*, at 46-48. But the Court rejected the FCC's contention because the Communications Act says nothing at all about the credit and cancellation program here:

> [N]othing in those provisions demands that cancellation be the sanction for failure to make agreed-upon periodic payments. Indeed, nothing in those provisions even requires the Commission to permit payment to be made over time, rather than leaving it to impecunious bidders to finance the full purchase price with private lenders.

537 U.S. at 304. *A fortiori*, nothing in the Communications Act controls the question of the parties' respective rights to the monetary proceeds

when the FCC provides secured financing and then cancels licenses when the bidders cannot make their payments.[13]

Even the dissenting opinion in *NextWave* rejected the FCC's dichotomy between regulatory and creditor actions accepted by the Ninth Circuit in this case. Directly contradicting the Ninth Circuit here – and consistent with the D.C. Circuit's *NextWave* decision – Justice Breyer's *NextWave* dissent recognized that regulatory cancellation under the present circumstances *is* equivalent to enforcement of the FCC's security interest. As he explained, "*In these very cases*, the Government sought to retake its license through enforcement of its security interest." 537 U.S. at 320 (Breyer, J., dissenting). It did so when "the FCC declared the licenses void for nonpayment. In a word, the FCC sought to repossess

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[13] Nor does any other statute or regulation – other than U.C.C. Article 9 – address the issue of the right to proceeds when the FCC cancels licenses for nonpayment. *See* Pet. App. 38a ("nothing in the Federal Communications Act (FCA) or FCC regulations governs this issue, allowing this Court to look to the UCC for guidance in determining federal common law"). Tacitly recognizing that it lacked any other authority for its argument, the FCC contended that an informal opinion letter authored by its general counsel that does briefly address the issues, *Leonard J. Kennedy, Esq.*, 11 F.C.C.R. 21572 (1996), was entitled to *Chevron* deference. But the Ninth Circuit properly rejected that contention under this Court's decisions in *Christensen v. Harris County*, 529 U.S. 576 (2000), and *United States v. Mead Corp.*, 533 U.S. 218 (2001). Pet. App. 10a n.7.

the licenses so that it could auction the related spectrum space to other users." *Id.* at 312.[14]

Thus, all nine Justices in *NextWave* rejected the FCC's position that creditor and regulatory actions are mutually exclusive. This Court's decision cannot be reconciled with the Ninth Circuit's holding in this case that the FCC's "regulatory and contractual right to cancel Magnacom's licenses . . . was *separate and independent* from the FCC's rights as a secured creditor." Pet. App. 19a. The Ninth Circuit did not purport to explain how repossession via cancellation was somehow not a disposition of collateral under federal common law incorporating U.C.C. Article 9 – it merely held that the FCC's exercise of regulatory authority avoided that inquiry altogether. That holding runs contrary to this Court's holding in *NextWave* and merits review by the Court.

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[14] Despite rejecting the FCC's premise, Justice Breyer would have ruled for the agency in *NextWave* because he believed enforcement of § 525 under these circumstances led to an "anomaly" in which ordinary secured creditors can enforce their security interests, but the FCC cannot. 537 U.S. at 319-20. As the Ninth Circuit recognized, the majority in *NextWave* "did not address the question whether license cancellation constituted lien enforcement." Pet. App. 17a. The majority did, however, disagree with Justice Breyer's view that enforcement of the plain language of § 525 created an "anomaly," because the cancellation power that the FCC sought to exercise went beyond the rights of ordinary secured creditors to enforce their security interests "in the bankruptcy process." 537 U.S. at 307.

III. The Ninth Circuit's Decision Is Contrary to *Kimbell Foods* and Other Decisions Holding That Federal Agencies Are Bound by the Same Rules That Apply to other Creditors.

Finally, the Ninth Circuit's decision upends the established rule that federal agencies that chose to act as creditors in the marketplace are bound by the same uniform state law rules that applies to all other creditors. *See Kimbell Foods*, 440 U.S. at 722-29.[15] Agencies often act as creditors in the market they regulate. And commercial actors structure their transactions in regulated markets based on the understanding that a uniform set of debtor-creditor law applies to federal agencies acting in the marketplace as well.

Indeed, this Court has long recognized the need for certainty for investors, because "[i]n structuring financial transactions, businessmen depend on state commercial law to provide the stability essential for reliable evaluation of the risks involved." *Kimbell Foods*, 440 U.S. at 739. Giving federal creditors special rights would "undermine that stability. Creditors who justifiably rely on state law . . . would have their expectations thwarted whenever a federal contractual security interest" is exempted from

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[15] When federal agencies become commercial creditors, federal courts must "adopt the readymade body of state law as the federal rule of decision until Congress strikes a different accommodation." *Kimbell Foods*, 440 U.S. at 740; *see also O'Melveny & Myers v. FDIC*, 512 U.S. 79, 85 (1994) ("matters left unaddressed [by a federal regulatory] scheme are presumably left subject to the disposition provided by state law").

generally applicable requirements. *Id.* The Court therefore has refused "to override intricate state laws of general applicability on which private creditors base their daily commercial transactions." *Id.* at 729.

Consistent with *Kimbell Foods*, the lower courts routinely apply the uniform body of commercial law supplied by the U.C.C. to federal agencies conducting commercial transactions. *See, e.g., United States v. Currituck Grain, Inc.*, 6 F.3d 200, 207 (4th Cir. 1993) (applying U.C.C. in context of Farmer's Home Administration loans and holding that "absent congressional direction to the contrary, nondiscriminatory state commercial law applies to . . . federal lenders"); *United States v. Progressive Farmers Marketing Agency*, 788 F.2d 1327, 1329 (8th Cir. 1986) (applying U.C.C. where FmHA acted as creditor); *United States v. Tugwell*, 779 F.2d 5, 7 (4th Cir. 1985) (per curiam) (same).

Moreover, the lower courts routinely apply federal debtor-creditor law incorporating the U.C.C. even when an agency claims it would be inconsistent with its regulations. *See United States v. Walter Dunlap & Sons, Inc.*, 800 F.2d 1232, 1238-39 (3d Cir. 1986) (where FmHA acted as creditor, holding that federal law incorporating U.C.C. applied rather than agency regulation); *Chicago Title Ins. Co. v. Sherred Village Assocs.*, 708 F.2d 804, 808 (1st Cir. 1983) (holding that agency regulations did not displace state law applicable to HUD as lender); *In re Kennedy*, 785 F.2d 1553, 1556 (11th Cir. 1986) (holding that agency regulations did not displace state law applicable to FmHA as lender).

The Ninth Circuit's holding allows every federal agency to evade generally applicable creditor-debtor laws by invoking its regulatory purposes for any action. Every federal agency that extends credit subject to security interests does so in furtherance of a broader regulatory agenda. The FCC is neither the first nor will it be the last federal agency to attempt to use its regulatory authority over a creditor to its benefit – particularly where the "benefit" is recovery of funds that would otherwise go to other creditors under routine application of the U.C.C. As the Court observed in *NextWave*, "[i]t is hard to imagine a situation in which a governmental unit would not have some further motive behind the cancellation – assuring the financial solvency of the licensed entity, or punishing lawlessness, or even (quite simply) making itself financially whole." 537 U.S. at 301 (citations omitted); *see also NextWave*, 254 F.3d at 153 (rejecting theory that "would allow governmental units to escape section 525's limitations simply by invoking a regulatory motive for their concern with timely payment").

The Ninth Circuit's decision undermines the stability provided by uniform commercial law in just the manner *Kimbell Foods* warned against. Magnacom's creditors and equity holders made their investments in the company against the backdrop of state commercial law that gives a debtor like Magnacom an unwaivable right to surplus proceeds when a secured creditor disposes of collateral in response to the debtor's default on its payment. As previously explained, this important guarantee protects debtors (and their other creditors) in the

very situation here: where fluctuating markets leave them in temporary distress. Although a secured creditor has the right to look to its collateral for repayment under these circumstances, that right extends only up to the amount of the debt itself, so that any surplus is available to pay the debtor's other creditors. Indeed, it is undisputed that if the FCC had left "it to impecunious bidders to finance the full purchase price [of the licenses] with private lenders," *NextWave*, 537 U.S. at 304, Magnacom's bankruptcy estate would be entitled to the surplus proceeds from the sale of its licenses after the secured private lender had been paid in full. The entire point of *Kimbell Foods* is that the same rules should apply to the FCC when it chooses to become a secured creditor.

Indeed, at every step of the way in this case, the FCC took advantage of its rights as a creditor. *Supra* at 4-9. But when the reauctioning of the license rights netted *more* than Magnacom owed, the FCC suddenly reversed course and disclaimed its creditor status in an effort to thwart the debtor's unwaivable right to the surplus. *Cf. In re NextWave Personal Commc'ns Inc.*, 244 B.R. 253, 257-63 (Bankr. S.D.N.Y. 2000) (detailing similar reversals of position by FCC in *NextWave* litigation as spectrum prices moved up and down), *vacated sub nom. In re FCC*, 217 F.3d 125 (2d Cir. 2000).

The Ninth Circuit gave its imprimatur to this gamesmanship. It applauded the FCC's exploitation of its regulatory power to avoid its obligations as a creditor. But under *Kimbell Foods*, a federal creditor

must take the bitter with the sweet. As the Seventh Circuit explained in a decision by Judge Easterbrook:

> To say, as *Kimbell Foods* . . . do[es], that federal creditors presumptively have the same rights under state law as do private creditors is to say that they also have the same obligations and limitations. If the federal agency, as creditor, oversteps its rights in seizing collateral, it is answerable under the UCC . . . .

Gorden v. Kreul, 77 F.3d 152, 155 (7th Cir. 1996).

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

United States Court of Appeals, Ninth Circuit.

In re MAGNACOM WIRELESS, LLC,
Debtor,

Donald A. Thacker,
Appellant,

v.

Federal Communications Commission;
United States of America,
Appellees.

No. 05-35839.

Before: BETTY B. FLETCHER, HARRY PREGERSON, and SANDRA S. IKUTA, Circuit Judges.

IKUTA, Circuit Judge:

This appeal requires us to consider the effect of the Federal Communications Commission's ("FCC") cancellation of licenses held by a licensee in bankruptcy proceedings. Donald Thacker, in his capacity as trustee to the bankruptcy estate of Magnacom Wireless, LLC ("Magnacom"), appeals the district court's decision to deny his claim to the proceeds from the FCC's auction of new licenses for the radio spectrum previously covered by Magnacom's cancelled licenses. We conclude that the FCC's cancellation of Magnacom's licenses extinguished Magnacom's interest in those licenses and the underlying spectrum. Such cancellation did not result in any traceable proceeds, and did not constitute a lien-enforcement remedy. Therefore,

Magnacom is not entitled to such proceeds. We have jurisdiction under 28 U.S.C. § 158(d)(1) and affirm the decision of the district court.

I.

Under the terms of the Communications Act of 1934 ("Act"), the FCC grants licenses for use of the radio spectrum. The licenses give licensees the right to use segments of the spectrum in various geographic areas for specified terms, in accordance with FCC provisions.[1] Pursuant to the Act, the licenses do not give licensees an ownership interest in the spectrum. *Id.*

Beginning in 1994, the FCC began selling the licenses based on a competitive bidding process. *See id.* § 309(j). With exceptions not relevant to the instant case, all proceeds from these auctions are deposited into the U.S. Treasury. *Id.* § 309(j)(8). As part of this new market-driven licensing process, the Act requires the FCC to "ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services...." *Id.* §

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[1] 47 U.S.C. § 301 states:

> It is the purpose of this chapter, among other things, to maintain the control of the United States over all the channels of radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license.

309(j)(4)(D). To fulfill this mandate, the FCC earmarks certain blocks of spectrum for auction to small, entrepreneurial companies known as "designated entities." 47 C.F.R. § 1.2110(a). Other license purchasers must pay the entire bid price at the time of the successful bid, but the FCC allows designated entities to pay only a down payment and then complete their purchase by making installment payments during the term of the license. 47 C.F.R. § 1.2110(g). FCC regulations condition these licenses upon "the full and timely performance of the licensee's payment obligations under the installment plan." 47 C.F.R. § 1.2110(g)(4); *see also* 47 C.F.R. § 1.2110(g)(4)(iv). Thus, in relation to designated entities, the FCC plays the dual role of regulator and creditor.

Magnacom, one such designated entity, was created for the purpose of obtaining licenses to the spectrum in order to provide personal communications services. In September 1996, Magnacom purchased a number of radio spectrum licenses from the FCC under an installment payment plan. Magnacom made down payments of ten percent of the purchase price for licenses to use "C block" spectrum segments and twenty percent of the purchase price for licenses to use "F Block" segments. In total, Magnacom paid approximately $7 million on a purchase price of approximately $55 million. For each license, Magnacom signed the FCC's standard promissory note and security agreement (the "Security Agreement"), promising to pay the rest of the purchase price in quarterly installments throughout the ten-year license term.

In the Security Agreement, Magnacom acknowledged: (1) it possessed no underlying right to the spectrum,[2] (2) the FCC's security interest in the licenses did not derogate from the FCC's regulatory authority over the licenses,[3] (3) the licenses would be automatically cancelled if an event of default occurred,[4] (4) Magnacom would not be entitled to any proceeds from the sale of new licenses following cancellation,[5] and (5) the Security Agreement would

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[2] "Debtor understands and acknowledges that it holds a mere conditional license to use the Spectrum with no ownership interest in the Collateral (or any underlying right to use the Spectrum)...." Security Agreement ¶ 2.

[3] "Debtor further understands and acknowledges that it is giving a security interest to the Commission in the Collateral only to assist the Commission in protecting its ability to enforce the Commission's regulations which condition holding the license in compliance with all then-applicable orders and regulations of the Commission, including, but not limited to, full and timely payment of all payments under the Installment Payment Plan. To that end, and not in derogation of any of the Commission's regulatory authority over the License, Debtor hereby acknowledges that the Commission has a first security interest in the Collateral...." Security Agreement ¶ 2.

[4] "If an Event of Default shall occur, the Commission shall thereafter have the following rights and remedies (to the extent permitted by applicable law) in addition to the rights and remedies relating to the Note, all such remedies being cumulative, not exclusive, and enforceable alternatively, successively or concurrently at such time or times as Commission deems expedient: (a) the License shall be automatically canceled pursuant to 47 C.F.R. § 1.2110." Security Agreement ¶ 8.

[5] "Debtor hereby acknowledges the Commission's authority, pursuant to the Communications Act of 1934, as amended, and

be subject to the Act, FCC regulations, and federal law.[6]

Not long after purchasing its licenses, Magnacom began to experience financial difficulties. In an attempt to meet its installment payment obligations, Magnacom restructured its debt by returning some licenses to the FCC, modifying other licenses, and using the resulting down payment credits to prepay for other licenses. Following this restructuring, Magnacom held eighteen licenses subject to the installment payment requirements and owed the FCC approximately $48 million. Despite this restructuring, Magnacom's financial difficulties continued.

On October 28, 1998, the day before Magnacom would have defaulted on its remaining installment

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the Commission's orders and regulations then-applicable to such licenses, to conduct another public auction or assign the License in the event that the Commission rescinds, cancels, or revokes the License for any default under this Agreement.... Debtor further acknowledges that in the event that the Commission rescinds, cancels, or revokes the License for any default under this Agreement ... Debtor has no right or interest in any moneys or evidence of indebtedness given to the Commission by a subsequent licensee of the Spectrum and that all such moneys or evidence of indebtedness are, and shall remain, the full property of the federal Treasury, pursuant to Section 309(j) of the Communications Act of 1934, as amended, and then-applicable commission orders and regulations." Security Agreement ¶ 8.

[6] "This Agreement shall be governed by and construed in accordance with Communications Act of 1934, as amended, then-applicable Commission orders and regulations, as amended, and federal law." Security Agreement ¶ 12.

payments, Magnacom filed a voluntary petition for relief under Chapter 11. In response, on April 21, 1999, the FCC asked the bankruptcy court for relief from the automatic stay imposed by 11 U.S.C. § 362. The bankruptcy court granted the request. In May 1999, the court lifted the stay on the FCC and ruled that "the FCC may pursue immediately any and all of its remedies, including its right to cancel the Defaulted Licenses if such licenses have not already [been] canceled as a matter of law." Thereafter, the FCC cancelled the licenses. On July 12, 1999, Magnacom's bankruptcy case was converted from Chapter 11 to Chapter 7.

In January 2000, the FCC filed a proof of claim as an unsecured creditor to obtain the approximately $48 million dollars that the Magnacom bankruptcy estate still owed for the now-cancelled licenses. With the acquiescence of Magnacom's trustee, the court approved the FCC's proof of claim.

In 2001, while the FCC's claim against the bankruptcy estate was pending, the FCC auctioned licenses to the spectrum segments formerly licensed to Magnacom. *See* Public Notice, C and F Block Broadband PCS Spectrum Auction Scheduled for December 12, 2000, 15 F.C.C.R. 19485 (2000). The new licenses offered by the FCC for auction did not have the same terms as the cancelled Magnacom licenses. Among other things, the new licenses were for a new ten-year term ending in 2011 (Magnacom's licenses had been set to expire in 2006 and 2007) and had different build-out construction deadlines. In addition, the FCC would not accept installment payments for the licenses. As it turned out, market

conditions had changed since the time Magnacom had won its licenses at auction. The winning bidders in the 2001 auction paid a total purchase price of $287 million, substantially more than Magnacom had paid for licenses to the same spectrum segments. Pursuant to 47 U.S.C. § 309(j)(8), the proceeds of the auction were deposited into the U.S. Treasury.

In light of the subsequent sale of new licenses, on February 12, 2003, Magnacom's trustee filed a motion to reconsider the FCC's allowed claim against Magnacom's bankruptcy estate. In his motion, the trustee opposed the FCC's unsecured claim on the ground that the reauctioned licenses were sold for a substantially higher price than was required to cover Magnacom's default. Despite the FCC's opposition, the bankruptcy court granted this motion on September 2, 2003, holding that the FCC was not entitled to any distribution from the estate.

On December 19, 2003, the trustee filed a complaint against the FCC in bankruptcy court, seeking the return of any proceeds from the auction of the new licenses that exceeded the amount Magnacom owed to the FCC. The bankruptcy court dismissed the complaint for failure to state a claim upon which relief could be granted. The trustee appealed this decision to the district court, which affirmed the decision on June 22, 2005. The trustee now appeals the decision of the district court.

II.

We review a dismissal for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6) de novo. *Pack v. United States,* 992 F.2d 955, 957

(9th Cir.1993). Limiting our review to the content of the trustee's complaint, "[a]ll allegations of material fact are taken as true and construed in the light most favorable to the nonmoving party." *Id.* Likewise, "[w]e review the district court's decision on an appeal from a bankruptcy court *de novo*." *Richmond v. United States,* 172 F.3d 1099, 1101 (9th Cir.1999) (quotation marks omitted).

III.

The principal issue in this appeal is the legal effect of the FCC's cancellation of Magnacom's licenses. It is undisputed that Magnacom's licenses were cancelled following the bankruptcy court's original decision to lift the stay. What the parties debate is the effect of this cancellation. Magnacom's trustee argues that the cancellation and subsequent spectrum auction is subject to Bankruptcy Code and Uniform Commercial Code ("UCC") rules that give the Magnacom estate entitlement to surplus proceeds. The FCC argues that under applicable statutes and regulations, once the licenses were cancelled, they ceased to exist and any right in the underlying spectrum was extinguished. Therefore, the proceeds from the auction of the new licenses were not property of the bankruptcy estate.

The plain language of the Act supports the FCC's position. Under 47 U.S.C. § 301, licenses "provide for the use" of the spectrum, "but not the ownership thereof." In other words, licensees have a property interest only in the use of the spectrum, not in the underlying spectrum itself. Moreover, § 301 provides that the property interest created by a license is

limited to "the terms, conditions, and periods" of the license itself. *Id.* Consistent with the Act, the Security Agreement states that licenses are extinguished upon non-payment, and convey no rights to the underlying spectrum. *See* Security Agreement, ¶ 2; *see also* 47 C.F.R. § 1.2110(g)(4)(iv) ("If an eligible entity obligated to make installment payments fails to pay the total Required Installment Payment ... it shall be in default, its license shall automatically cancel, and it will be subject to debt collection procedures."). Because licenses "provide for the use" of the spectrum and convey no ownership interest "beyond the terms, conditions, and periods of the license,"47 U.S.C. § 301, it follows that once the licenses are cancelled for nonpayment, the licenses cease to exist along with any interest in the spectrum for which the license was issued. *See FCC v. NextWave Pers. Commc'ns Inc.*, 537 U.S. 293, 307-08, 123 S.Ct. 832, 154 L.Ed.2d 863 (2003) (describing cancellation as "eliminating the licenses"). Thus, under the plain language of the statute and applicable regulations, once an FCC license is cancelled, a licensee no longer has any right derived from that license and therefore has no entitlement to the proceeds from the auction of a new license.[7]

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[7] The FCC explained its position on this issue in an opinion letter that addresses precisely the circumstance presented in this case:

> [I]t is our understanding that, where there is collateral in goods or other tangible property, the proceeds from the liquidation of collateral would be applied to debts (and other costs) due. In the case of FCC licenses that are cancelled and reauctioned, however, there is no

There is one wrinkle to this analysis, but it does not change the result in this case. Section 525 of Title 11 states that "a governmental unit may not ... revoke ... a license ... to ... a person that is ... a debtor under this title ... solely because such ... debtor ... has not paid a debt that is dischargeable in the case under this title...." 11 U.S.C. § 525.[8] Applying § 525

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liquidation of the collateral by the FCC and no proceeds from the resale of the defaulted license because the license is canceled and, in effect, disappears.

LEONARD J. KENNEDY, ESQ., 11 F.C.C.R. 21572, 21576 (OGC/WTB 1996) (citation omitted). This opinion letter does not have the force of law and is not entitled to any *Chevron* deference. *See Christensen v. Harris County*, 529 U.S. 576, 587, 120 S.Ct. 1655, 146 L.Ed.2d 621 (2000). We find its analysis persuasive because, as explained above, licenses provide only for the use of the spectrum and convey no ownership interest beyond the license term. Once the licenses are cancelled for nonpayment, the licenses cease to exist.

[8] The full text of 11 U.S.C. § 525(a) reads:

> Except as provided in the Perishable Agricultural Commodities Act, 1930, the Packers and Stockyards Act, 1921, and section 1 of the Act entitled "An Act making appropriations for the Department of Agriculture for the fiscal year ending June 30, 1944, and for other purposes," approved July 12, 1943, a governmental unit may not deny, revoke, suspend, or refuse to renew a license, permit, charter, franchise, or other similar grant to, condition such a grant to, discriminate with respect to such a grant against, deny employment to, terminate the employment of, or discriminate with respect to employment against, a person that is or has been a debtor under this title or a bankrupt or a debtor under the Bankruptcy Act, or another person with whom such bankrupt or debtor has been associated, solely because such bankrupt or debtor

in a factual situation similar to ours, the Supreme Court held that the FCC's regulatory authority to cancel licenses did not trump the provision of § 525; rather, the FCC was precluded from cancelling a license solely because of the licensee's failure to pay on a debt dischargeable in bankruptcy. *NextWave*, 537 U.S. at 304, 123 S.Ct. 832. Thus, the FCC's decision to cancel Magnacom's licenses for nonpayment would be subject to challenge under § 525.

NextWave is not applicable here, however, because Magnacom's trustee does not challenge the FCC's cancellation of the licenses and does not seek relief based on § 525. Magnacom's trustee did not object to the FCC's motion for relief from the automatic stay to allow the FCC to cancel the licenses. Nor does the trustee now argue that the FCC's cancellation of the licenses violated § 525; in his opening brief trustee explicitly accepts the FCC's cancellation, stating that "Magnacom is not trying to recover its licenses or set aside their transfer to new licensees." Section 525 is not applicable when, as

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is or has been a debtor under this title or a bankrupt or debtor under the Bankruptcy Act, has been insolvent before the commencement of the case under this title, or during the case but before the debtor is granted or denied a discharge, or has not paid a debt that is dischargeable in the case under this title or that was discharged under the Bankruptcy Act.

here, an entity does not challenge the cancellation of its license.[9]

IV.

Although the plain language of the statute and applicable regulations indicate that Magnacom had no entitlement to proceeds from a new auction, the trustee argues that cancellation did not eliminate the bankruptcy estate's right to collect surplus proceeds from the auction of new licenses covering the same spectrum. The trustee asserts that both the Bankruptcy Code and the UCC provide independent bases for the return of "surplus proceeds" from the second auction.

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[9] Besides noting that both Magnacom and the bankruptcy court had previously given their consent to the cancellation of the licenses, the bankruptcy court also rested its conclusion that § 525 was not applicable on the alternative basis that Magnacom was in Chapter 7 bankruptcy not Chapter 11 bankruptcy, unlike the debtor in *NextWave,* 537 U.S. at 297, 123 S.Ct. 832. Because debts of corporations are not dischargeable under Chapter 7 bankruptcy, § 525 would not be applicable in Magnacom's Chapter 7 case. *See* 11 U.S.C. § 727(a) ("The court shall grant the debtor a discharge, unless ... the debtor is not an individual."); *see also NLRB v. Better Bldg. Supply Corp.,* 837 F.2d 377, 378 (9th Cir.1988) ("Partnerships and corporations may not discharge their debts in a liquidation proceeding under Chapter 7 of the Code."). On this record, however, it is unclear whether the FCC cancelled the licenses while Magnacom's proceedings were in Chapter 11 or Chapter 7. Magnacom remained in Chapter 11 bankruptcy proceedings after the bankruptcy court lifted the stay, and the record does not reflect the date that the FCC cancelled the licenses. However, given the fact that § 525 is ultimately not relevant to the trustee's claim, we need not reach the bankruptcy court's alternative holding.

The trustee's argument under the Bankruptcy Code is as follows. Once Magnacom entered bankruptcy, its interests in the licenses, as well as the proceeds of those licenses, became property of the bankruptcy estate. 11 U.S.C. § 541(a)(1), (a)(6). The term "proceeds" includes all funds "traceable to" or "substituted for" the original property. *See* 11 U.S.C. § 541(a)(6). Because Magnacom's licenses gave it the exclusive right to use a portion of the spectrum, the FCC's cancellation of the Magnacom licenses freed up that portion of the spectrum. As a result, the trustee argues, the FCC was enabled to sell new licenses, and the proceeds from the sale of the new licenses are traceable proceeds of the cancelled Magnacom licenses, and thus property of the bankruptcy estate.

We are unpersuaded by the trustee's argument based on the Bankruptcy Code. This argument is based on the premise that Magnacom retained an interest in the spectrum after the FCC cancelled its licenses, a premise we have already rejected. If a bankruptcy estate includes a valuable property interest that is sold, or swapped for a different piece of property, the proceeds remain part of the estate. *See Catalano v. Comm'r,* 279 F.3d 682, 686 (9th Cir.2002). Thus, if the FCC had sold Magnacom's licenses, the Magnacom estate might have rights to proceeds from such a sale. Alternatively, if Magnacom retained rights to the spectrum covered by its licenses, the Magnacom estate might have rights to proceeds from the sale of new licenses to use the underlying spectrum. However, in this case, Magnacom's property-the licenses-were extinguished

and had no value once they were cancelled by the FCC. And as we have previously noted, Magnacom had no interest in the underlying spectrum or any subsequent licenses for the spectrum. *See* 47 U.S.C. § 307(a). When the property of an estate no longer exists and has not been disposed of in any way that generated proceeds, the trustee has no remedy. *See generally* 44 GEORGE GLEASON BOGERT ET AL., THE LAW OF TRUSTS AND TRUSTEES § 921 (6th ed.2007). Here the licenses were extinguished and were simply not disposed of in any way.

It is true that the FCC had to cancel Magnacom's licenses before the FCC could sell new licenses for the underlying spectrum. However, this fact alone does not give Magnacom any rights to proceeds from the new licenses. A creditor's lawful extinction of a property right in the bankruptcy estate does not give the trustee in bankruptcy rights to other property created by that creditor. *See In re Gull Air, Inc.*, 890 F.2d 1255, 1262 (1st Cir.1989) ("[W]hen a debtor's proprietary interest expires by operation of an express condition, the Bankruptcy Code does not preserve that interest and prevent termination."). Therefore, the FCC's sale of new licenses for the use of spectrum segments to which Magnacom had no rights did not generate any proceeds traceable to Magnacom's licenses.

We are also unpersuaded by the trustee's UCC argument. The trustee contends that the Security Agreement gave the FCC a security interest in the licenses that could be enforced only pursuant to the terms of the UCC. *See* Security Agreement, ¶ 8(i) (giving the FCC "any remedies of a Secured Party

under the Uniform Commercial Code."). Article 9 of the UCC sets forth a secured creditor's lien-enforcement remedies. Under Article 9 of the UCC (subject to multiple procedural requirements), after a borrower defaults, the secured creditor may sell its collateral subject to the borrower's right to any surplus from the sale. UCC §§ 9-610, 9-615. If a creditor held a security interest in the proceeds of Magnacom's licenses, and the licenses had been sold, the creditor would have owed the Magnacom estate any proceeds beyond what was necessary to satisfy the debt owed to the creditor. *See MLQ Investors, L.P. v. Pac. Quadracasting, Inc.*, 146 F.3d 746, 749 (9th Cir.1998). The trustee contends that the UCC likewise applies to the FCC's enforcement of the Security Agreement and requires the FCC to return the excess proceeds from its auction of new licenses to the bankruptcy estate.

If we assume that the UCC is applicable to the Security Agreement (an issue we do not reach), the UCC would support the trustee's claim of entitlement to proceeds from the FCC's sale of new licenses only if the FCC's cancellation of the licenses was a lien-enforcement remedy under the UCC. The trustee argues that both the applicable regulations and the Security Agreement make cancellation a lien-enforcement remedy. We look at both in turn.

By its terms, the Security Agreement does not make cancellation a lien-enforcement remedy. However, the trustee relies on *NextWave Personal Communications, Inc. v. F.C.C.*, 254 F.3d 130 (D.C.Cir.2001), aff'd by, *NextWave*, 537 U.S. 293, 123 S.Ct. 832, 154 L.Ed.2d 863, to support this

argument. As noted above, *NextWave Personal Communications, Inc.* involved a debtor who raised various challenges to the FCC's cancellation of its license, including the ultimately successful argument that § 525 prevented the FCC from cancelling its licenses. In response, the FCC made a highly technical argument. The FCC first pointed out that under 11 USC § 362(b)(4), the automatic stay does not prevent the government from taking certain regulatory actions. The FCC argued that such allowable regulatory actions include cancelling a debtor's licenses. If it interpreted § 525 as precluding the FCC from cancelling a debtor's licenses, the court would create a conflict with § 362(b)(4). The court rejected this argument on the ground that § 362(b)(4) did not apply to license cancellation in this case. The court noted the FCC's concession that "canceling the licenses and seeking to collect on the debt was 'tantamount to ... foreclosing on collateral.'" *Id.* at 151. Because foreclosure actions are not exempt from the automatic stay under § 362(b)(4), the court concluded that it could read § 525 to prohibit the FCC from cancelling licenses without conflicting with § 362(b)(4). *Id.* We do not consider this brief discussion to be the D.C. Circuit's reasoned conclusion that cancellation of an FCC license is a lien-enforcement action. The D.C. Circuit's suggestion that § 362(b)(4) did not exempt the FCC's license cancellation from the automatic stay was based on the FCC's concession that its action was "tantamount to foreclosing on collateral." In our circuit, statements made in passing, without

analysis, are not binding precedent. *See, e.g., United States v. Johnson,* 256 F.3d 895, 915 (9th Cir.2001). Moreover, the D.C. Circuit's decision was superceded by the Supreme Court's analysis in *Nextwave*, which did not address the question whether license cancellation constituted lien enforcement. *NextWave,* 537 U.S. at 302, 123 S.Ct. 832. Therefore, we reject the trustee's argument that under the D.C. Circuit's *NextWave* decision we must interpret the Security Agreement to make cancellation a lien-enforcement remedy.

The trustee also points to regulations governing the licenses that state that when a licensee misses an installment payment "it shall be in default, its license shall automatically cancel, *and* it will be subject to debt collection procedures." 47 C.F.R. § 1.2110(g)(4)(iv) (emphasis added). According to the trustee, the use of "and" suggests that cancellation triggers a hybrid regulatory and lien-enforcement action that is subject to typical debtor-creditor law. We read this language in the opposite way: after non-payment, the license is extinguished *and* the debtor will be held accountable for the unpaid licensee fees. *See LEONARD J. KENNEDY, ESQ.*, 11 F.C.C.R. 21572, 21576. This is exactly how the FCC proceeded in this case: it took steps to obtain relief from the automatic stay in order to cancel Magnacom's licenses, and then proceeded to enforce its claims as an unsecured creditor in the bankruptcy proceedings.

Finally, we disagree with the trustee's reading of *NBD Park Ridge Bank v. SRJ Enterprises, Inc. (In re SRJ Enterprises, Inc.),* 150 B.R. 933, 938

(Bankr.N.D.Ill.1993), and its progeny to support the argument that because the FCC had a security interest in the licenses, its cancellation of those licenses must be deemed to be a lien-enforcement remedy. *In re SRJ Enterprises, Inc.* involved a debtor in Chapter 11 bankruptcy proceedings who sold his car dealership and, as part of the sales price, received a "termination fee" for voluntarily terminating his Nissan sales franchise. *Id.* at 935. Nissan would not have issued a new franchise to the buyer of the dealership until the debtor terminated the existing franchise. *Id.* The court determined that the creditor's security interest in "general intangibles" included a security interest in the termination fee received by the debtor. *Id.* at 939-40. In the course of reaching this conclusion, the court analogized to cases allowing lenders to enforce security interests in the proceeds from sales of FCC licenses, even though FCC did not allow lenders to take a security interest in the licenses themselves. *Id.*

These cases do not help the trustee. Unlike our case, the debtor in *In re SRJ Enterprises, Inc.* owned a valuable right; the right to terminate its franchise agreement. The bankruptcy court merely held that a secured creditor had an interest in the proceeds derived from exercising that right. Similarly, secured creditors may take a security interest in the proceeds derived from licensees' exercise of their valuable right to sell or transfer their licenses. By contrast, Magnacom did not own a termination right or any other valuable right. Any value stemming from Magnacom's license was extinguished when the

FCC unilaterally cancelled the license pursuant to its contractual and regulatory rights. Moreover, nothing in *In re SRJ Enterprises, Inc.* suggests that the FCC was required to enforce its security interest in the licenses, rather than merely cancelling them.

We conclude that the trustee's UCC arguments are to no avail. The FCC had a regulatory and contractual right to cancel Magnacom's licenses. This right was separate and independent from the FCC's rights as a secured creditor. Nothing in the Security Agreement or the applicable regulations indicates that a license cancellation must be viewed as a lien-enforcement remedy, and we decline to do so. Because the FCC's license cancellation is not a UCC lien-enforcement remedy, the UCC's requirements are simply inapplicable. Therefore, even if the UCC were applicable to the Security Agreement, it would not entitle Magnacom to proceeds after its licenses were extinguished.[10]

In sum, under 47 U.S.C. § 301, once Magnacom's licenses were cancelled by the FCC, Magnacom's licenses had no value and Magnacom's interest in the underlying spectrum was extinguished. This valueless asset could not generate any traceable proceeds for purposes of the Bankruptcy Code. Moreover, nothing in the Security Agreement or

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[10] By the same token, the fact that a debtor's rights to surplus proceeds are unwaivable under U.C.C. § 9-602(4) is not relevant in this case. The FCC did not exercise its lien-enforcement remedies and did not sell collateral owned by Magnacom. Therefore, it received no surplus proceeds to which Magnacom was entitled.

applicable law requires us to treat the FCC's license cancellation as a lien-enforcement proceeding subject to the UCC. Therefore, Magnacom had no entitlement to the proceeds from any subsequent sale of new licenses covering the same spectrum.

V.

Finally, the trustee argues that principles of issue preclusion and judicial estoppel barred the FCC from claiming that Magnacom was not entitled to the proceeds from the sale of new licenses for the spectrum covered by the Magnacom licenses.

The trustee's issue preclusion argument is based on the bankruptcy court's September 2, 2003 order disallowing the FCC's unsecured claim against the bankruptcy estate. In its order, the bankruptcy court indicated that the FCC was not entitled to recover the $48 million that Magnacom had failed to pay for the now-cancelled licenses because the FCC's claim had been satisfied by the sale of the new licenses. The court stated that it was "unconvinced by the FCC's argument that the claim may not be reconsidered because the licenses that it subsequently auctioned were different licenses than the ones previously held by the Debtor.... No matter how labeled, however, the FCC could not have auctioned these licenses to new users, *but for* the Debtor's default." *In re Magnacom Wireless, LLC,* No. 98-39048, at 5-6 (Bankr.W.D.Wa. Sept. 2, 2003) (memorandum decision on motion for reconsideration). However, in ultimately disallowing the FCC's claim, the court relied primarily on the FCC's policy statement that it would "'forgive any

outstanding debt so long as it has been made whole (penalties and costs included) in a subsequent auction.'" *Id.* at 6 (quoting *LEONARD J. KENNEDY, ESQ.*, 11 F.C.C.R. at 21576). The court concluded:

> Although the FCC disputes that it received a $238 million surplus from the subsequent auction of the licenses, the FCC has conceded that the proceeds from the subsequent auction exceed the amount of its claim against the Debtor's estate. If the Court were to accept the FCC's argument, the FCC would unquestionably receive a substantial windfall. Such a result would be contrary to the FCC's position as stated in the [policy] letter that it would "forgive outstanding debt so long as it has been made whole (penalties and costs included) in a subsequent auction." 11 F.C.C.R. at 21576. Prevention of such a double recovery to the harm of the Debtor's creditors and estate, particularly where the claimant has recognized in its own policy statements that such a result would be inequitable, is precisely the type of circumstance that Fed.R.Civ.P. 60(b)(5) or (6) should be utilized to prevent.

Id. at 7-8.

Moreover, although the bankruptcy court refused to allow the FCC to proceed against Magnacom, the court expressly did not conclude that Magnacom was entitled to proceeds from the FCC's sale of the new licenses. In this same order, the court stated that it

"recognizes that the part[i]es have included briefing on issues that are not necessarily before the Court at this time. For example, the Movants are taking the position that the estate also has substantial claims against the FCC for the $238 million surplus. The Court simply concludes that the FCC is not entitled to any further claim against the estate for the $48,187,219.73." In a subsequent order, the bankruptcy court reiterated that it did not reach the issue of whether Magnacom was entitled to surplus proceeds. The court concluded that "[t]he issue decided by the Court in its September 2, 2003 Decision was whether reconsideration of the FCC's claim was proper. The Court made it clear in its decision that this was the only issue before it, and that it was not making any rulings on whether the estate had any claim to the surplus proceeds." *In re Magnacom Wireless, LLC,* No. 98-39048, at 6 (Bankr.W.D.Wa. Oct. 5, 2004) (memorandum decision on motion to dismiss complaint).

Reading the entirety of the bankruptcy court's order in context, and giving due weight to the court's subsequent interpretation of its own order, we must conclude that the court did not decide the question whether Magnacom was entitled to proceeds from the sale of the new licenses. *Id.* at 8. "A party invoking issue preclusion must show: (1) the issue at stake is identical to an issue raised in the prior litigation; (2) the issue was actually litigated in the prior litigation; and (3) the determination of the issue in the prior litigation must have been a critical and necessary part of the judgment in the earlier action." *Littlejohn v. United States,* 321 F.3d 915,

923 (9th Cir.2003). Because the "issue at stake" in this case is not "identical to an issue raised in the prior litigation" and has not been adjudicated, issue preclusion does not bar the FCC from making its arguments here.[11]

The trustee also argues that the FCC's claim is barred by the doctrine of judicial estoppel. "Judicial estoppel is an equitable doctrine that precludes a party from gaining an advantage by asserting one position, and then later seeking an advantage by taking a clearly inconsistent position." *Hamilton v. State Farm Fire & Cas. Co.*, 270 F.3d 778, 782 (9th Cir.2001). The trustee failed to raise this argument before either the bankruptcy court or the district court. We, therefore, deem it waived. *See El Paso v. Am. W. Airlines, Inc.* (*In re Am. W. Airlines, Inc.*), 217 F.3d 1161, 1165 (9th Cir.2000).

VI.

In sum, we uphold the bankruptcy court's dismissal of the trustee's claim. The FCC's license cancellation extinguished Magnacom's rights to the underlying spectrum. Magnacom has no claim to the proceeds of the subsequent auction of new licenses covering the same spectrum.

Affirmed.

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[11] We also reject the trustee's argument that the bankruptcy court's October 5, 2004 ruling on this issue confused issue preclusion and claim preclusion. As our analysis indicates, the bankruptcy court did not reach the issue of the legal effect of the license cancellation.

APPENDIX B

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF WASHINGTON

No. 98-39048

In re
MAGNACOM WIRELESS, LLC,
Debtor,
Adversary No. A03-4274

DONALD A. THACKER,
Trustee,
v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,
Defendants.

MEMORANDUM DECISION ON MOTION TO DISMISS COMPLAINT

This matter came before the Court on June 16, 2004, on a Motion to Dismiss Complaint filed by the United States, on behalf of the Federal Communications Commission (FCC). After considering the pleadings, post-hearing memorandums, exhibits and arguments of counsel, the Court makes the following findings of fact and conclusions of law:

I. FINDINGS OF FACT

Magnacom Wireless, LLC (Magnacom) purchased a number of radio spectrum licenses for personal communications services (PCS) from the FCC through its "C Block" and "F Block" auctions. These PCS spectrum licenses were sold by the FCC on credit to qualified bidders under installment payment plans.

As a condition of receiving each license, Magnacom was required to make a down payment to the FCC of 10% of its net bid for each C Block License and 20% of its net bid for each F Block License. The aggregate amount of the down payments made for the licenses was $6,895,787.50. Magnacom also executed a note (collectively Notes) and a security agreement (collectively Security Agreements) for each license.

Almost immediately, the Debtor encountered difficulties in making the installment payments due the FCC. Initially, it unsuccessfully attempted to restructure the debt by returning some of the licenses to the FCC, disaggregating other licenses and using the resulting down payment credits to prepay for other licenses. After the restructuring, the Debtor held four licenses free and clear of any indebtedness to the FCC, and 18 licenses still covered by Notes and Security Agreements. On October 28, 1998, one day before it would have been in default under the Notes and Security Agreements, the Debtor filed a voluntary petition for relief under Chapter 11, Title 11.

On May 14, 1999, the Court signed an uncontested Order Granting United States' Motion for Declaratory Judgment or, in the Alternative, Relief from the Automatic Stay, *In Re Magnacom Wireless, LLC*, (98-39048, No. 45) (May 14, 1999 Order). Pursuant to this order, the FCC was, to the extent required, relieved from the stay imposed by 11 U.S.C. § 362, and authorized to pursue "any and all of its remedies, including its right to cancel the Defaulted Licenses if such licenses have not already canceled as a matter of law." May 14, 1999 Order at 2. The May 14, 1999 Order was not appealed. The case was converted to Chapter 7 on July 12, 1999, and a Chapter 7 Trustee (Trustee) was appointed on July 22, 1999.

On January 4, 2000, the FCC filed a proof of claim as an unsecured creditor with a petition date claim of $48,187,219.73. On March 14, 2001, the current Trustee's predecessor filed an application to allow certain claims, including those of the FCC, and disallow others. The FCC filed a response, and on April 9, 2001, the Court entered an order allowing claims, including that of the FCC.

In December, 2000, and January, 2001, the FCC conducted an auction in which it sold reconstituted spectrum licenses repossessed from Magnacom. This sale closed on January 26, 2001. The reauctioned licenses were sold for an aggregate sales price of $287,050,250.

On February 12, 2003, the Trustee filed a motion to reconsider the allowed claim of the FCC on the grounds that the FCC reauctioned the defaulted

licenses for substantially more money than the FCC's January 4, 2000 claim. The FCC filed a response to the motion for reconsideration, and the hearing on the motion was continued by the parties several times. The FCC and Trustee resolved the objection, and on June 10, 2003, filed an Application for Order Approving Stipulation for Subordination and Release RE: Claim filed by the Federal Communications Commission, *Magnacom Wireless*, (98-39048, No. 197). The Trustee's motion was objected to by several creditors and equity holders who filed their own motion for reconsideration on June 26, 2003. On September 2, 2003, this Court entered a Memorandum Decision on Motion for Reconsideration of Allowances of FCC's Claim and Application to Approve Stipulation and an Order Granting Motion for Reconsideration of Allowances of FCC's Claim and Denying Motion to Approve Stipulation, *Magnacom Wireless*, (98-39048, No. 277-78) (September 2, 2003 Decision). The Court determined that the FCC was not entitled to any distributions from the estate and disallowed the FCC's claim of $48,187,219.73.

On December 19, 2003, the Trustee filed a complaint against the United States and the FCC for the return of the surplus proceeds. In the alternative, the Trustee sought a refund of the Debtor's down payments for the licenses. The FCC has filed a motion to dismiss the Trustee's complaint in its entirety, on the grounds that the complaint fails to state claims upon which relief can be granted.

II. CONCLUSIONS OF LAW AND DISCUSSION

A. Motion to Dismiss

This case comes before the Court on a motion to dismiss. For the purposes of a motion to dismiss, the court takes all facts alleged in the plaintiff's complaint as true. The court must construe the allegations in the complaint and reasonable inferences arising from the complaint favorably to the non-moving party. A motion to dismiss will only be granted if it "'appears beyond doubt that [the] plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Wyler Summit P'ship v. Turner Broad. Sys., Inc.*, 135 F.3d 658, 661 (9th Cir.1998) (quoting *Hydranautics v. FilmTec Corp.*, 70 F.3d 533, 535-36 (9th Cir. 1995)).

In ruling on the motion to dismiss, the Court is confronted with what the parties have recognized as unique and novel issues of law. After a review of the pleadings it does not appear as if there are factual disputes. The Court has been asked to determine whether a debtor in bankruptcy has any interest in the proceeds of licenses that were canceled, reconstituted, and reauctioned by the FCC after being granted relief from the automatic stay. Since the FCC began issuing licenses and granting license purchasers credit under installment payment plans, courts have been struggling with issues that arise because of the dual role the FCC assumes in these transactions as both creditor and regulator. These issues are made more difficult because the Debtor is also in bankruptcy, and because of the interplay of both federal and state law.

In accordance with 47 U.S.C. § 301, a licensee is granted a right to use the public radio spectrum "but not the ownership thereof," for "limited periods of time," and "no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license." It is FCC policy that a lender may not perfect a security interest in a broadcast license itself. *See In re Cheskey*, 9 F.C.C.R. 986, 987 at ¶ 8 (1994). The rationale for this policy is that the Commission's statutory mandate appears to require it to approve the qualifications of every applicant for a license. 47 U.S.C. § 310(d). If a security interest holder were to foreclose on the collateral license, by operation of law, the license could transfer hands without the prior approval of the Commission." *Cheskey*, 9 F.C.C.R. at 987, ¶ 8.

The Commission, however, has recognized that the granting of a "security interest in the proceeds of the sale of a license does not raise the same concerns." *Cheskey*, 9 F.C.C.R. at 987, ¶ 9. In addition, several courts, including the Ninth Circuit Court of Appeals, have held that a creditor can perfect a security interest in the proceeds from the sale of a license. *MLQ Investors, L.P. v. Pacific Quadracasting, Inc.*, 146 F.3d 746, 748 (9th Cir. 1998); *In re Beach Television Partners*, 38 F.3d 535, 537 (11th Cir. 1994); *In re Ridgely Communications, Inc.*, 139 B.R. 374, 379 (Bankr. D. Md. 1992). Thus, despite 47 U.S.C. § 301, the FCC has recognized that a licensee does at least possess *some* property interest in the proceeds of a broadcast license.

It is also clear that a broadcasting license becomes property of the estate when a bankruptcy

petition is filed. *See* 11 U.S.C. § 541; *In re Central Ark. Broad. Co.*, 68 F.3d 213, 214-15 (8th Cir. 1995); *Ridgely Communications*, 139 B.R. at 376. Under the Bankruptcy Code, property of the estate includes all "[p]roceeds . . . of or from property of the estate." 11 U.S.C. § 541(a)(6).

B. Primary Issues Presented by the Parties

As set forth above, the primary issue in this case is whether a debtor in bankruptcy has any interest in the proceeds of licenses that were canceled, reconstituted, and reauctioned by the FCC after being granted relief from the automatic stay. The FCC generally argues that any interest of the Debtor in the licenses or proceeds had been extinguished by (1) the Court's May 14, 1999 Order granting relief from stay, (2) cancellation of the licenses, and/or (3) the express waiver contained in the Security Agreements. According to the Trustee, however, an interest in the proceeds remains property of the estate because (1) the Court previously rejected the FCC's argument in a binding ruling, (2) 11 U.S.C. § 525 prevents the FCC from terminating the Debtor's interest in the proceeds, and/or (3) the estate has an unwaivable right to the proceeds under the Uniform Commercial Code (UCC) and the Bankruptcy Code.

1. Effect of Prior Court Orders and Decision.

Each party has devoted a significant portion of their arguments to the effect of two of the Court's prior orders. The Trustee argues that the FCC is barred under the doctrine of collateral estoppel from relitigating the issue of whether the Debtor's estate

has an interest in the proceeds by the Court's September 2, 2003 Decision. The second order at issue is the Court's May 14, 1999 Order. The FCC argues that the May 14, 1999 Order specifically granted it the authority to cancel the licenses at issue.

a. September 2, 2003 Decision

The Trustee alleges that the Court in its September 2, 2003 Decision previously rejected the FCC's arguments that the estate has no interest in the surplus reauction proceeds. The Trustee asserts that because of the September 2, 2003 Decision, the FCC is barred by the doctrine of collateral estoppel from arguing that cancellation of the licenses severed the estate's interest in the proceeds of the reauctioned licenses.

The Trustee's argument that the FCC is collaterally estopped from arguing that the licenses were canceled is incorrect. The issue decided by the Court in its September 2, 2003 Decision was whether reconsideration of the FCC's claim was proper. The Court made it clear in its decision that this was the only issue before it, and that it was not making any rulings on whether the estate had any claim to the surplus proceeds.

> The Court recognizes that the [parties] have included briefing on issues that are not necessarily before the Court at this time. For example, the Movants are taking the position that the estate also has substantial claims against the FCC for the $238 million surplus. The Court simply concludes that the FCC is

> not entitled to any further claim against the estate for the $48,187,219.73.

September 2, 2003 Decision, No 227, at 8.

Accordingly, the Court concludes that the FCC is not barred by the doctrine of collateral estoppel from arguing that cancellation of the licenses severed the estate's interest in the proceeds of the reauctioned licenses.

b. May 14, 1999 Order

The FCC argues that the Court's May 14, 1999 Order granted it authority to cancel the licenses. The May 14, 1999 Order provides, in pertinent part, that "the FCC may pursue immediately any and all of its remedies, including its right to cancel the Defaulted Licenses if such licenses have not already canceled as a matter of law." May 14, 1999 Order at 2. Entry of the May 14, 1999 Order was not opposed by the Debtor. On May 11, 1999, the Debtor filed a response to the FCC's motion for relief from stay indicating that the Debtor "does not oppose the motion filed herein on behalf of the United States seeking relief from the automatic stay, and Magnacom Wireless, LLC consents to the entry of an order granting relief from the automatic stay to the United States." Resp. of Magnacom Wireless, LLC to Mot. of United States of America for Relief from the Automatic Stay at 1, *Magnacom Wireless*, (98-39048, No. 41).

A hearing was held on the FCC's motion where counsel for the Debtor appeared. At the hearing, Debtor's counsel indicated that while the Debtor did

not consent to the entry of a declaratory judgment, "Magnacom's conclusion is that there is no equity and it has no reasonable prospects of reorganization, so Magnacom does not oppose this and intends to convert to a Chapter 7 after sometime next week, after the conclusion of today's hearing." Tr. May 14, 1999 at 4, *Magnacom Wireless*, (98-39048, No, 93).

An order lifting the automatic stay does not by itself eliminate the estate's interest in property. *Catalano v. Commissioner*, 279 F.3d 682, 686-87 (9th Cir. 2002). In the May 14, 1999 Order, the Court did not render a declaratory ruling that the licenses had canceled as a matter of law. The order does not contain such language, and the Court made it clear at the hearing that it was not rendering such a ruling. Tr. May 14, 1999 at 15.

The Court did rule, however, that once the stay was lifted the FCC could pursue any and all of its remedies, "including its right to cancel the Defaulted Licenses." May 14, 1999 Order at 2. Prior to signing the order, the Court specifically asked whether the Debtor had any objection to the form of the proposed order. The Debtor's counsel suggested that paragraph 2 be revised to read, "including its right[,] if any[,] to cancel the defaulted licenses." Tr. May 14, 1999 at 13. The Debtor's counsel then commented that, "[i]t makes no substantive difference in this case under the circumstances." Tr. May 14, 1999 at 13. Counsel for the FCC explained that the reason for the proposed language in paragraph 2 of the order was the concern that someone would later question the FCC's ability to terminate the licenses and reauction the spectrum if

the order merely granted relief from stay. Tr. May 14, 1999 at 13-14. The Court signed the order as proposed.

The Court has the authority to interpret its own orders. Based on the plain language of the May 14, 1999 Order and considering the context in which it was entered, this Court concludes the order merely lifted the stay to allow the FCC to exercise any rights available to it under non-bankruptcy law. The Court did not order the licenses canceled, or grant the FCC authority to cancel the licenses if it did not already possess such authority. Rather, the Court lifted the stay to allow the FCC to cancel the licenses, assuming that cancellation was a remedy available to it outside of bankruptcy. Debtor's counsel consented to such relief at the hearing when he stated: "We think the appropriate relief is . . . relief from automatic stay. And whatever rights they have after they obtain relief, they can proceed with." Tr. May 14, 1999 at 4-5. Similar to the September 2, 2003 Decision, this order was never appealed. The May 14, 1999 Order was not a declaratory ruling that the FCC could cancel the licenses as a matter of law.

2. Cancellation of the Licenses.

For the reasons stated above, the Court concludes that after the stay was lifted on May 14, 1999, the FCC was authorized to cancel the licenses so long as it possessed such authority under applicable non-bankruptcy law.

In accordance with both FCC regulations and the Security Agreements, a licensee's failure to make full

and timely installment payments causes the license to automatically cancel. *See* Security Agreements ¶ 8(a); 47 C.F.R. § 1.2110. It is undisputed that the Debtor defaulted on its payment obligations to the FCC. Assuming the stay may have prevented cancellation of the licenses while it was in effect, once the stay was lifted, these licenses canceled automatically under the terms of FCC regulations and the Security Agreements entered into between the parties.

The Trustee, however, responds that cancellation of the licenses by the FCC was prohibited by 11 U.S.C. § 525, which provides that "a governmental unit may not . . . revoke . . . a license" of a bankruptcy debtor "solely because" the debtor "has not paid a debt that is dischargeable in the case under this title." 11 U.S.C. § 525(a). In support of his argument, the Trustee relies on the decision of the United States Supreme Court in *FCC v. NextWave Pers. Communications, Inc.*, 537 U.S. 293, 123 S. Ct. 832 (2003). In *NextWave*, the Supreme Court held that 11 U.S.C. § 525 prohibited the FCC from revoking a license that had been granted under the same installment plan at issue in this case, solely because of a failure to pay its debts. *NextWave*, 537 U.S. at 307, 123 S. Ct. at 842.

Clearly, 11 U.S.C. § 525(a) prevents unilateral revocation of a license for failure to pay debt that is "dischargeable" in bankruptcy. The Debtor's case, however, was converted to Chapter 7 on July 12, 1999. As a corporation, the Debtor had no dischargeable debts. Under the plain language of 11 U.S.C. § 727(a)(1) only an individual is eligible to

receive a discharge. Consequently, by its language, 11 U.S.C. § 525(a) does not apply.

The Court does not find it to be determinative that the Debtor was in a Chapter 11 on the day that the relief from stay order was entered. The case was converted to Chapter 7 less than two months later on July 12, 1999. The reauction of the reconstituted licenses did not take place until long after the Debtor had converted to Chapter 7. Further, at the relief from stay hearing, counsel for the Debtor indicated that the Debtor did not oppose the motion because its intent was to convert to Chapter 7 after the conclusion of the hearing. Tr. May 14, 1999 at 4. Thus, it was made clear to all parties at the May 14, 1999 hearing that conversion was imminent, and conversion in fact occurred shortly thereafter.

In addition, the case before the Court is distinguishable from *NextWave* because 11 U.S.C. § 525 arose only when the FCC took the position that it had the unilateral right to cancel the Debtor's licenses for non-payment. *NextWave*, 537 U.S. at 298, 123 S. Ct. at 837. In this case, rather than unilaterally canceling the licenses, the FCC first sought relief from stay specifically to authorize such cancellation, assuming that the licenses had not canceled previously as a matter, of law. Implicit in the *NextWave* decision is the proposition that the mere grant of relief from the stay does not necessarily grant a government creditor free reign to cancel a license without violating 11 U.S.C. § 525. The May 14, 1999 Order, however, did not only grant relief from stay. The order specifically authorized the FCC to cancel the licenses if it possessed such

authority under applicable non-bankruptcy law. Incontrovertible, the May 14, 1999 Order was entered with the understanding that the FCC was seeking to obtain permission, if necessary, from this Court to cancel the licenses. Once entered, the only impediment to cancellation for the FCC would have been outside of bankruptcy.

Further, the Debtor indicated at the hearing that it had no objection to cancellation, assuming that the FCC had the right to do so under non-bankruptcy law. During the May 14, 1999 hearing, no one questioned the FCC's authority to cancel the licenses under bankruptcy or non-bankruptcy law. The Court is now confronted with an after-the-fact adversary complaint that such cancellation was prohibited by 11 U.S.C. § 525. Unlike *NextWave*, the FCC in this case canceled the licenses at issue in reliance on an order that granted it relief from stay to cancel the licenses. No appeal of the order was filed, nor did the Debtor challenge the cancellation or reauction. It was not until several years later when the FCC reauctioned the licenses for an amount significantly greater than the original debt that this argument was raised. Based on these facts, the Court concludes that 11 U.S.C. § 525 did not prevent the FCC from canceling the Debtor's licenses after receiving court authority to lift the stay for the specific purpose of doing so if permitted outside of bankruptcy.

The Trustee counters that it is not relying on 11 U.S.C. § 525 or *NextWave* to restore the licenses to the Debtor, or to argue that it was improper for the FCC to reauction the licenses to third parties.

Rather, the Trustee relies on 11 U.S.C. § 525 and *NextWave* as support to reject the FCC's argument that cancellation of the licenses destroyed any remaining interest of the Debtor in the licenses or their proceeds. As the Court concludes that 11 U.S.C. § 525 did not prevent cancellation of the licenses in this case, the logical conclusion is that it also does not grant the Debtor greater rights to the proceeds than it would have possessed outside of bankruptcy.

3. Effect of Cancellation.

The final step in this analysis is to determine the effect of the license cancellation on the estate's interest in the proceeds. The Trustee makes a persuasive argument that despite the express waiver contained in paragraph 8(d) of the Security Agreements, the Debtor possesses an unwaivable interest in the proceeds under the UCC. The Court agrees that nothing in the Federal Communications Act (FCA) or FCC regulations governs this issue, allowing this Court to look to the UCC for guidance in determining federal common law. There still remains, however, the issue of the effect of canceling the licenses, as opposed to repossession and seeking to enforce a security interest. The remaining issue is then whether upon such cancellation, any rights the Debtor may have had in the proceeds under the UCC, by virtue of the Security Agreements, ceased to exist.

It is clear that the issue is again one of first impression. Although both sides cited several cases in support of their position, including *In re Gull Air,*

Inc., 890 F.2d 1255 (1st Cir. 1989), *In re Metro Motor Sales, Inc.*, 160 B.R. 267 (Bankr. D. Conn. 1993), *NBD Park Ridge Bank v. SRJ Enters., Inc. (In re SRJ Enters., Inc.)*, 150 B.R. 933 (Bankr. N.D. Ill. 1993), and *Bonem v. Golf Club of Ga., Inc.*, 591 S.E.2d 462 (Ga. Ct. App. 2003), the Court reviewed these cases and concludes each to be distinguishable and not dispositive. The parties were unable to provide, and the Court is not aware of, any case that speaks specifically to the issue of a licensee's rights in proceeds from the sale or auction of collateral by a secured party, who is also a regulating authority, after cancellation of the license. What is unique about this case is that it arises because the FCC is wearing two hats–that of regulator and creditor.

The Court concludes that when the FCC canceled the Debtor's licenses, the Debtor's estate had no remaining interest in the licenses. The FCA provides that a licensee is granted a right to use the public radio spectrum "but not the ownership thereof," for "limited periods of time," and "no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license." 47 U.S.C. § 301. The fact that the Debtor was in bankruptcy when the licenses canceled does not expand the limited right it held in the licenses. *See Clare's Food Mkt., Inc. v. Foothill Capital Corp. (In re Coupon Clearing Serv., Inc.)*, 113 F.3d 1091, 1099 (9th Cir. 1997); *Gendreau v. Gendreau (In re Gendreau)*, 191 B.R. 798, 802 (9th Cir. BAP 1995) (the Bankruptcy Code neither creates nor enhances property rights), *aff'd*, 122 F.3d 815 (9th Cir. 1997). The Trustee does not dispute that the Debtor

forfeited any interest in the licenses upon cancellation. The more difficult issue, however, is the issue of whether canceling a license also means that the Debtor forfeited all of its interest in the surplus proceeds on the reauction by the FCC.

The Court concludes that the better reasoned analysis is that upon cancellation the Debtor retained no further interest in the licenses or the proceeds. As defined by Black's Law Dictionary, "cancel" means: "1. To destroy a written instrument by defacing or obliterating it <she canceled her will by marking through it>. 2. To terminate a promise, obligation, or right <the parties canceled the contract>." *Black's Law Dictionary* (7th ed. 1999).

When the Debtor filed bankruptcy and defaulted on its payment obligations to the FCC, the FCC had two options available. It could either act as a secured creditor and seek to enforce its security interest (in which case the UCC would likely apply and the Debtor would retain an interest in the proceeds), or act as regulator and cancel the licenses. The FCC chose the second option.

The Supreme Court in *NextWave* recognized this distinction when discussing the options available to the FCC upon a debtor's default. The FCC can either act as a secured creditor and assert its security interest upon default or act as a regulator and cancel the licenses. *NextWave*, 537 U.S. at 304, 123 S. Ct. at 840. The Supreme Court stated, "[w]hat is at issue, however, is not the enforcement of that interest in the bankruptcy process, but rather elimination of the licenses through the regulatory

step of 'revoking' them—action that the statute specifically forbids." *NextWave*, 537 U.S. at 307-08, 123 S. Ct. at 842 (footnote omitted). In this case, after obtaining court approval, the FCC made a policy choice to take the regulatory step of canceling the licenses. Once canceled, pursuant to the FCC regulatory authority, the estate's interest in any later surplus terminated. 47 U.S.C. § 301.

The equities of the case also favor the FCC's position. Prior to and while in bankruptcy, the Debtor had opportunities available to it to prevent cancellation. For instance, pursuant to FCC regulations, a debtor can request several grace periods prior to cancellation. See 47 C.F.R. § 1.2110(g)(4). A debtor can also attempt to negotiate a workout arrangement with a third-party lender. As long as there is not a transfer of control, FCC approval of such arrangement would not be necessary. A third option would be to transfer control of the licenses to a third-party, by either the debtor or the bankruptcy trustee. FCC approval would be required in this situation. These options were either not pursued or not feasible in the case before the Court. Rather, the Debtor consented to relief from stay to cancel the licenses after concluding that there was no equity and no reasonable prospects of reorganization. Tr. May 14, 1999 at 4.

Although not the determinative factor, the Court is also concerned by the delay on the Trustee's part in asserting any interest in the proceeds. The relief from stay order was entered in May, 1999. The licenses were reconstituted and reauctioned in

December, 2000, and January, 2001. It was not until February, 2003, and after the auction had taken place, that the Trustee first made a motion to reconsider the FCC's claim. Also, it was not until several creditors then became involved that the argument was first made that the estate had any entitlement to the proceeds beyond having satisfied the FCC's claim in full. A party cannot sit on its rights indefinitely and then expect to assert a position contrary to all parties' prior expectations.

Although "the FCC could not have auctioned these licenses to new users, *but for* the Debtor's default," the Trustee ignores the fact that the Debtor's licenses had no equity when relief from stay was granted in May, 1999. September 2, 2003 Decision, No. 277, at 6. The Debtor recognized this fact when it consented to entry of the order. Additionally, the licenses auctioned by the FCC in 2000 and 2001, were not the same licenses the Debtor possessed. The term of the Debtor's licenses would have expired in 2006, and the build-out requirements expired in September, 2001. The reauctioned licenses had new 10-year terms and new build-out requirements. It was possible these new terms, plus a changing market, gave the reauctioned licenses value.

Although acting as both a regulator and secured creditor, the FCC chose to cancel the defaulted licenses rather than repossess and enforce its security interest, after seeking bankruptcy court authority. When a license is canceled, a licensee's rights to use the license is extinguished as well as any other interests it may have possessed in such

licenses. This includes any rights the Debtor may have had in the reauctioned proceeds under the UCC.

C. Down Payment

The last issue before the Court concerns the Debtor's entitlement to a refund of the down payments. The Debtor made down payments of 10% of the auction price for its C Block licenses and 20% of the auction price for its F Block licenses, for aggregate down payments totaling $6,895,787.50. The Trustee argues that since the FCC reauctioned the licenses for $287,050,250, it would be a windfall for the FCC to keep both the reauction proceeds and the down payments. Specifically, the Trustee argues that it is entitled to return of the down payment by FCC regulations, on an unjust enrichment theory and as part of a rescission of the Notes and Security Agreements. The Court disagrees.

The Trustee's interpretation of FCC regulations has specifically been dismissed by the Commission. *See In re Amendment of Part 1 of the Commission's Rules-Competitive Bidding Procedures, Third Order on Reconsideration of the Third Report and Order*, 19 F.C.C.R. 2551 (2004). In this Third Order on Reconsideration of the Third Report and Order, the Commission clarified that an installment licensee whose license was canceled would not have a claim for reimbursement for funds paid prior to a subsequent auction. Rather, "the license is cancelled and all of the cash paid is lost." *Third Order on Reconsideration of the Third Report and Order*, 19 F.C.C.R. at 2558 (footnote omitted).

Even on a motion to dismiss, the Court concludes that the Trustee has no entitlement to the down payment under an unjust enrichment or rescission theory. Justice and equity do not require that these funds be paid to the Debtor's estate. The only payments made by the Debtor was a 10% down payment for the C Block licenses and the 20% down payment for the F Block licenses. Yet, the Debtor retained the licenses for a period equal to or greater than that percentage of the license term. Based on the Court's conclusions, there is also no basis for finding that the Notes and Security Agreements are illegal contracts which would result in their rescission.

The FCC's motion to dismiss the Trustee's complaint is granted.

DATED: October 5, 2004

/s/
Paul B. Snyder
U.S. Bankruptcy Judge

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA
Case No. C04-5681FDB

Bankruptcy Appeal No. 04-008
Bankruptcy No. 98-39048-PBS
Adversary Case No. 03-04274-PBS

DONALD A. THACKER,
Trustee-Plaintiff-Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,
Defendants-Appellees.

ORDER AFFIRMING BANKRUPTCY MEMORANDUM DECISION

This matter is before the Court upon Plaintiff-Appellant's appeal of the Bankruptcy Court's Order and Memorandum Decision on Motion to Dismiss Complaint for failure to state a claim of action pursuant to Fed. R. Civ. P. 12(b)(6). Plaintiff basis its appeal on three central contentions of err. Plaintiff asserts the bankruptcy court erred in its conclusion that: (1) § 525 of the Bankruptcy Code does not bar the FCC from canceling Plaintiff's license; (2) collateral estoppel did not bar the FCC from litigating the issue of whether or not the interest in Plaintiff's proceeds were eliminated by

canceling the licenses; and (3) surplus proceeds obtained from the sale of reauctioned spectrum licenses were not the property of the bankruptcy estate.

The Court, having reviewed the brief of Appellant and its reply, the brief of Appellees, the memorandum decision, records contained in the file herein, and being fully advised finds for the reasons set forth below, that the decision of the Bankruptcy Court is **AFFIRMED**.

I.

47 U.S.C. § 309(j) authorizes the Federal Communication Commission (FCC) to allocate licenses by auction for entrepreneurial or start-up companies. In 1996, Magnacom Wireless, LLC (Magnacom) submitted winning bids and purchased seventeen licenses of radio spectrum for personal communications services (PCS). Because Magnacom qualified under FCC regulations, Magnacom was not required to pay the entire amount it bid for the licenses in one lump sum, but was allowed to make a ten-percent down payment and execute promissary notes of installment payments over a ten-year term. Pursuant to FCC regulations, the seventeen licenses were granted subject to a condition that Magnacom make timely and full payment of the amount of its winning bid, the failure of which results in automatic cancellation of the licenses. Magnacom signed installment payment plans and security agreements for each of the licenses. The security agreement included a specific waiver of any right to the proceeds of any subsequent auction after license

cancellation. As collateral, the FCC took perfected security interest in the licenses. Magnacom and the FCC later modified the installment payment plans, but retained the language requiring automatic cancellation for failure to make timely and full installment payments.

On October 28, 1998, one day before it would have been in default, Magnacom filed for Chapter 11 reorganization. On May 14, 1999, the bankruptcy court signed an uncontested order granting FCC's motion for declaratory judgment or, in the alternative, relief from the automatic stay. *In Re Magnacom Wireless, LLC.*, (98-39048, No. 45). Plaintiff contends it strenuously objected to granting declaratory relief, but admits its consent to lifting the automatic stay. Pursuant to the May 14, 1999 order, the FCC was, to the extent required, relieved from the stay imposed by 11 U.S.C. § 362, and authorized to pursue "any and all of its remedies, including its right to cancel the defaulted licenses if such licenses have not already canceled as a matter of law." May 14, 1999 Order at 2. Subsequent to the order, the case was converted to Chapter 7 bankruptcy and a Bankruptcy Trustee was appointed.

On January 4, 2000, the FCC filed a proof of claim as an unsecured creditor with a petition date claim of $48,187,219.73. On March 14, 2001, the trustee filed an application to allow certain claims, including those of the FCC, and disallow others. The FCC filed a response and on April 9, 2001, the bankruptcy court entered an order allowing claims, including that of the FCC.

In December, 2000, and January 2001, the FCC conducted an auction in which it sold reconstituted spectrum licenses repossessed from Magnacom. Leading up to the new auction, the FCC issued public notices and Notices of Proposed Rulemaking, and ultimately adopted rules governing the new auction. Magnacom did not file any objections to the FCC's rulemaking proceeding, and did not appeal the final revised auction rules. Each new license issued as a result of the 2001 auction was granted for a new ten year term ending in 2011.

Since the date of Plaintiffs cancellation, the demand for spectrum had changed, and the winning bids for the spectrum licenses in the 2001 auction were far higher than the winning bids in the original 1996 auction. The reauctioned licenses were sold for an aggregate sales price of $287,050,250. The winning bidders bid approximately $240 million more than Magnacom's original winning bids.

On February 12, 2003, the Trustee filed a motion to reconsider the allowed claim of the FCC on the grounds that the FCC reauctioned the defaulted licenses for substantially more money than the FCC's January 4, 2000 claim. The bankruptcy court determined that the FCC was not entitled to any distributions from the estate and disallowed the FCC's claim of $48,187,219.73.

On December 19, 2003, the Trustee filed a complaint against the FCC for the return of the surplus proceeds. In the alternative, the Trustee sought a refund of the debtor's down payments for the licenses. Magnacom contends its other creditors

have received only a fraction of Magnacom's debts to them, and Magnacom's equity holders have not recovered their investments in the company. The FCC moved for dismissal stating all rights to the proceeds ceased with the cancellation of the licences. The bankruptcy court granted the dismissal on the theory that the government agency has special rights through regulatory powers that ordinary secured creditors do not have. This Court agrees.

III.

Jurisdiction over this appeal is pursuant to 28 U.S.C. § 158 (a)(1). In reviewing a bankruptcy court's decision, a district court reviews factual findings for clear error and legal conclusions of law *de novo*. *Diamant v. Kasparian* (*In re Southern Cal. Plastics, Inc.*), 165 F.3d 1243, 1245 (9th Cir. 1999); *Cook, Perkiss, and Liehe v. N. Cal. Collection Serv. Inc.*, 911 F.2d 242, 244 (9th Cir. 1990). A motion to dismiss for failure to state a claim will be denied unless it appears that plaintiff can prove no set of facts which would entitle him to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Fidelity Fin. Corp. v. Federal Home Loan Bank of San Francisco*, 792 F.2d 1432, 1435 (9th Cir. 1986). All material allegations in the complaint will be taken as true and construed in the light most favorable to the plaintiff. *NL Indust., Inc. v. Kaplan*, 792 F.2d 896, 898 (9th Cir. 1986).

IV.

A. Collateral Estoppel

Plaintiff invokes issue preclusion as an independent ground upon which the bankruptcy court's decision should be reversed. This argument fails.

Collateral Estoppel bars the relitigation of issues actually adjudicated in previous litigation between the same parties. *Little John v. United States*, 321 F.3d 915 (9th Cir. 2003) (quoting *Clark v. Bear Stearns & Co.*, 966 F.2d 1318, 1320 (9th Cir. 1992)). A party invoking issue preclusion must show: (1) the issue at stake is identical to an issue raised in the prior litigation; (2) the issue was actually litigated in the prior litigation; and (3) the determination of the issue in the prior litigation must have been a critical and necessary part of the judgment in the earlier action. *Id.* The Supreme Court has elaborated on the "actually litigated" requirement, recognizing that issue preclusion is inappropriate where the parties have not had a full and fair opportunity to fully litigate the merits of an issue. See *Allen v. McCurry*, 449 U.S. 90, 94-95 (1980).

Plaintiff contends issue preclusion applies in this matter because the bankruptcy court's 2003 order disallowing the FCC's $48 million claim against Plaintiff addressed the issue of whether Plaintiff's interest in the spectrum ceased upon cancellation of the licenses. Plaintiff contends the court ruled that the reauction proceeds satisfied Magnacom's debt to the FCC, precisely because Magnacom retained an

interest in those proceeds. Plaintiff relies on the court's statement:

> The Court is unconvinced by the FCC's argument that the claim may not be reconsidered because the licenses that it subsequently auctioned were different licenses than the ones previously held by the Debtor. The FCC relies on the fact that the Debtor's licenses were allegedly cancelled, the fact that the FCC is prohibited from reauctioning licenses under 477 U.S.C. 309(j), and the fact that the new licenses had different terms and different spectrum bandwidth configurations. No matter how labeled, however, the FCC could not have auctioned these licenses to new users, but for the debtor's default.

Reply Brief of Appellant at 24.

Accordingly, Plaintiff urges the Court to conclude that the FCC should not have had the opportunity to relitigate this same issue during the adversary proceeding. Plaintiff s reliance on the bankruptcy 2003 order is misplaced. The two issues are not the same. The court was not decidina the question of whether proceeds from the sale or new licenses were part of the debtor's estate. Appellee's Brief at 37; September 2, 2003 Order at 6. The issue at the time was narrowed strictly to whether the court should reconsider the FCC's claim and whether to approve the stipulation:

> The Court recognizes that the [parties] have included briefing on issues that are not necessarily before the Court at this time. For

> example, the Movants are taking the position that the estate also has substantial claims against the FCC for the $238 million surplus. The Court simply concludes that the FCC is not entitled to any further claim against the estate for the $48,187,219.73.

Memorandum Decision at 7.

In reaching its conclusion, the court expressly explained that it was not relying on Plaintiff's argument. Instead, the court relied upon the FCC's policy of not seeking to collect further on the outstanding debt of a defaulted licensee if the subsequent auction for the spectrum to a new licensee covers the amount of the original outstanding debts. Appellees Brief at 7 citing *Leonard J. Kennedy, Esq.*, 11 FCC Red. 21, 572. Accordingly, the Court affirms the bankruptcy court's decision that the FCC was not barred by the doctrine of collateral estoppel from arguing that cancellation of the licenses severed the estate's interest in the proceeds of the reauctioned licenses.

B. 11 U.S.C. §525 Does Not Apply

Plaintiff contends the bankruptcy court erroneously ruled that 11 U.S.C. §525 did not apply. 11 U.S.C. §525 reads in pertinent part:

> [A] governmental unit may not deny, revoke, suspend or refuse to renew a license... to... a person that is... a debtor under this title... solely because such ... debtor has not paid a debt that is dischargeable. 11 U.S.C. §525.

Plaintiff contends §525 prevents unilateral revocation of a license for failure to pay a debt that is "dischargeable" in bankruptcy and relies upon the Supreme Court decision in *FCC v. NextWave Personal Communications, Inc.*, 537 U.S. 300 (2003), which held that §525 prohibited the FCC from revoking a license paid through the installment program solely because of a failure by a bankruptcy debtor to pay its debts. *Id.* at 307. Plaintiff contends, at the time of petitioning for Chapter 11 bankruptcy, Plaintiff was not in default of payment for the licenses. Furthermore, Plaintiff contends that §525 does apply because Plaintiff did not convert the action to Chapter 7 bankruptcy until after the May 1999 Order had canceled the the licenses.

The bankruptcy court concluded that §525 did not apply because Plaintiff, as a corporation, had no dischargeable debts. Under the plain language of 11 U.S.C. §727(a)(1), only an individual is eligible to receive a discharge. Plaintiff asserts the bankruptcy court's decision is erred and contends that §525's language indicates that the test is whether Magnacom's debt to the FCC is the "kind of debt" that can be discharged, not whether Magnacom is the "kind of debtor" entitled to a discharge. Plaintiff urges this Court to conclude that §525 applies because Plaintiff's debt is "dischargeable," that is, capable of being discharged.

Plaintiff's interpretation of §525 is misplaced. See *In re Tri-R Builders, Inc.*, 86 BR 138 (ND Ind 1986) (Debtor that is corporation is not entitled to discharge under 11 U.S.C.S. §727); *In re Goodman*,

81 BR 786 (WD NY 1988) (Corporations are not entitled to discharge in Chapter 7 case under 11 U.S.C.S. 727(a)(1); *NLRB v. Better Bldg. Supply Corp.*, 837 F.2d 377 (9th Cir. 1988) (partnerships and corporations may not, under 11 U.S.C.S. §727, discharge their debts in liquidation proceedings); *In re Liberty Trust Co.*, 130 BR 467 (WD Tex 1991) (Chapter 7 corporate debtor has no existence or life outside of bankruptcy estate, but rather is defunct, because corporation is not entitled to discharge under 11 U.S.C.S. §727; therefore, it may not assert rights to causes of action or assets abandoned by Chapter 7 trustee); *In re Gulfstream Marina, Restaurant & Motel, Inc.*, 2 BR 26 (SD Fla 1979) (11 U.S.C. §727 provides discharge only for individuals because bankrupt corporation, unlike bankrupt natural person, has virtually no prospect of future property accumulation...). It is clear that §525 applies to individuals, not corporations. Accordingly, this Court sees no reason to dispute the bankruptcy court's decision.

Of equal importance, is the fact that Plaintiff consented to the lifting of the stay to allow the FCC to exercise its regulatory rights of cancellation: "The Debtor consented to an order lifting the automatic stay because it was believed that Magnacom owed more to the FCC than the market value of the collateral (i.e., the licenses) at that time..." Brief of Appellant at 7. As the bankruptcy court pointed out in its decision, it was not until several years later when the FCC reauctioned the licenses for an amount significantly greater than the original debt that this argument was first raised. At the hearing,

Plaintiff had ample opportunity to object to the lifting of the stay to avoid cancellation, assuming the FCC had the right to do so under non-bankruptcy law; however, for its own reasons, Plaintiff chose not to do so. In fact, Plaintiff did not exercise any of its rights to avoid cancellation. Plaintiff did not utilize the grace period afforded under the regulation; Plaintiff did not appeal the order lifting the stay; and Plaintiff did not contest the re-auction. This Court is not persuaded by Plaintiff's after-the-fact argument that cancellation was prohibited. Accordingly, the Court affirms the bankruptcy court's decision that §525 does not apply.

C. Surplus Proceeds

Plaintiff asserts that the bankruptcy court erred in concluding the FCC's regulatory cancellation of the licenses eliminated Plaintiff's property interests in the surplus proceeds of the re-auction. Plaintiff contends the proceeds are traceable to Plaintiffs licenses, that is, but for Plaintiff's default, the licenses would not have cancelled and the spectrum would not have been reauctioned. Accordingly, Plaintiff urges this Court to conclude that the regulatory cancellation ended Plaintiff interests and permitted use of the licenses only– cancellation did not end Plaintiff's rights to the proceeds. Plaintiff relies on the fundamental tenet of debtor-creditor law that a secured creditor has an interest in the proceeds of collateral only to the extent necessary to pay off the debt owned to that creditor, which in this case was $48 million. Plaintiff contends, once the secured debt was paid in full, all surplus proceeds from the collateral should have reverted to Plaintiff.

The issue of a debtor's right to the surplus proceeds is one of first impression. There are no FCC regulations and nothing in the Federal Communications Act (FCA) which governs this issue. Accordingly, the bankruptcy court relied upon the Supreme Court *NextWave* decision which recognized the FCC's distinctive roles of creditor and regulator:

> The FCC initially participated in the bankruptcy proceeding as a creditor. See, e.g., *In re NextWave Persona Comm. Inc.*, 241 B.R. 314 (Bkrtcy Ct. SDNY 1999). However, after NextWave prepared a plan of reorganization the FCC asserted that the licenses had been automatically cancelled and gave notice of its intent to reauction them The Second Circuit treated this decision as "regulatory,' and thus outside the scope of the Bankruptcy Court's jurisdiction. See in re *FCC*, 217 F.3d 125, 139, 136 (2000). The decision by the D.C. Circuit recognized and seemingly approved that distinction. See 349 U.S. App. D.C. 53 (2001).

NextWave, at 842 n.5.

The bankruptcy court agrees with Plaintiff's argument that Plaintiff may have been entitled to the proceeds had the FCC reclaimed the licenses as a secured creditor. However, that was not the case. Accordingly, this Court finds no reason to dispute the bankruptcy court decision.

Similar to the actions of the FCC in *NextWave*, the FCC in the case at bar may have initially participated in the bankruptcy proceeding as a creditor; however, upon requesting the court to lift

the stay to exercise its rights under the law outside of bankruptcy, the FCC was clearly acting under its regulatory function. The bankruptcy court concluded that determining the right to the proceeds upon reauction of a cancelled license is a regulatory function and therefore its review is outside the power of the bankruptcy court. See *In re FCC*, 217 F.3d 125 ("We expressly deferred to the FCC's 'expert judgment as to the course that would best promote congressional objectives and serve the public interest'"). The Court agrees with the bankruptcy court decision. Accordingly, the Court concludes that cancellation of the licenses eliminated not only Plaintiff's security interests in the property, but also eliminated whatever rights Plaintiff had in the surplus proceeds of the re-auction as well.

ACCORDINGLY,

IT IS ORDERED:

(1) The Court affirms the Memorandum Decision on Motion to Dismiss Complaint;

(2) The adversary complaint is dismissed pursuant to Fed. R. Civ. Pro. 12 (b)(6);

(3) The Clerk is directed to send copies of this Order to Plaintiff-Appellant, Defendants-Appellees, and to the Hon. Paul B. Snyder.

DATED this 22nd day of June, 2005.

/s/
FRANKLIN D. BURGESS
UNITED STATE DISTRICT COURT

APPENDIX D

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF WASHINGTON

No. 98-39048

In re: MAGNACOM WIRELESS, LLC,
Debtor.

MEMORANDUM DECISION ON MOTION FOR RECONSIDERATION OF ALLOWANCES OF FCC'S CLAIM AND APPLICATION TO APPROVE STIPULATION

This matter came before the Court on August 1, 2003, on an Application for Order Approving Stipulation for Subordination and Release Re: Claim filed by the Federal Communications Commission (FCC) (Motion to Approve Stipulation) filed by the Chapter 7 Trustee (Trustee), and, a Motion of Whalebone Group and Pacwest Network (collectively "Movants") for Leave to Challenge FCC's Claim, for Reconsideration of Allowances of FCC's Claim, and/or for Declaration that FCC's Claim Has Been Satisfied in Full (Motion for Reconsideration). After considering the pleadings, exhibits and arguments of counsel, the Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

In September, 1996, Magnacom Wireless, LLC (Debtor) purchased a number of radio spectrum licenses for personal communications services (PCS) from the FCC through its "C Block" and "F Block"

auctions. These PCS spectrum licenses were sold by the FCC on credit to qualified bidders under installment payment plans. The Debtor made a down payment and executed a Note and Security Agreement in favor of the FCC for each license. Almost immediately, the Debtor encountered difficulties in making the installment payments due the FCC. Initially, it unsuccessfully attempted to restructure the debt by returning some of the licenses to the FCC, disaggregating other licenses and using the resulting down payment credits to prepay for other licenses. After the restructuring, the Debtor held four licenses free and clear of any indebtedness to the FCC, and 18 licenses still covered by Notes and Security Agreements. On October 28, 1998, one day before it would have been in default under the Notes and Security Agreements for the 18 licenses, the Debtor filed a voluntary petition for relief under Chapter 11, Title 11.

On May 14, 1999, the Court signed an uncontested Order Granting United States' Motion for Declaratory Judgment or, in the Alternative, Relief from the Automatic Stay. Pursuant to such order, the FCC was, to the extent required, relieved from the stay imposed by 11 U.S.C. § 362(a), and authorized to pursue "any and all of its remedies, including its right to cancel the Defaulted Licenses if such licenses have not already canceled as a matter of law." The May 14, 1999 order was not appealed. The case was converted to Chapter 7 on July 12, 1999, and the Trustee was appointed on July 22, 1999.

On January 4, 2000, the FCC filed a proof of claim as an unsecured creditor with a petition date claim of $48,187,219.73. On March 14, 2001, the Trustee filed an application to allow certain claims, including that of the FCC, and disallow others. The FCC filed a response, and on April 9, 2001, the Court entered an order allowing several claims, including that of the FCC.

On February 12, 2003, the Trustee filed a motion to reconsider the allowed claim of the FCC on the grounds that the FCC reauctioned the defaulted licenses for substantially more than the FCC's claim. According to the Trustee's motion for reconsideration, the licenses were reauctioned for an aggregate sales price of $289,082,750. The FCC filed a response to the motion for reconsideration, and the hearing on the Trustee's motion to reconsider was continued by the parties several times. The FCC and Trustee resolved the objection, and on June 10, 2003, the Trustee filed the Motion to Approve Stipulation. The Trustee's motion was objected to by the Movants.

The Movants filed their Motion for Reconsideration on June 26, 2003. The Motion for Reconsideration was subsequently joined by John Warta. The FCC opposes the Movant's Motion for Reconsideration.

CONCLUSIONS OF LAW

The Court first concludes that the Movants have standing to seek reconsideration of the FCC claim and to object to the proposed settlement between the Trustee and the FCC. Not only has the Trustee

declined to withdraw his motion for reconsideration of the FCC's claim, but has requested that the Court consider the Movants' motion. Further, the FCC at the August 1, hearing, withdrew its contention that the Movants lack standing. Accordingly, the Court does not find the proposition set forth in *In re Bakke*, 243 B.R. 753, 756 (Bankr. D. Ariz. 1999) (creditor does not have standing to object to the claims of another creditor when a trustee has been appointed) to bar the present motion. To the extent necessary, the Court hereby grants the Movants the requisite standing to contest the FCC's claim.

The Movants initially assert that it is not necessary to reconsider the order allowing the FCC claim in order to grant the relief sought. The order allowing the FCC's claim merely determined that the Debtor owed the FCC $48,187,219.73 as of *the petition date*. See 11 U.S.C. § 502(b). Since the Movants do not contest that this was the value of the claim as of the petition date, before the FCC's reauction, they argue that there is no reason to reconsider the claim.

The Court is not persuaded by the Movants' argument. If true, the only valid reason for reconsidering an order allowing claims would be if the value as of the petition date was in error. The Court does not read 11 U.S.C. § 502(j) so narrowly. In order to give complete meaning to each section of 11 U.S.C. § 502, the Court concludes that whenever a party seeks to contest a claim that has already been allowed or disallowed by order, the better method is to do so as a motion for reconsideration pursuant to 11 U.S.C. § 502(j). In addition, as a practical matter,

the Court believes that such a procedure is the most efficient manner for bringing this issue before the Court. Once filed, unless challenged, the FCC has an allowed claim of $48,187,219.73. If there are assets in the estate to distribute to creditors, the FCC is entitled to payment on its allowed claim unless the claim is reconsidered.

The next issue to be decided is whether reconsideration of the FCC claim should be granted. According to 11 U.S.C. § 502a), a claim that has been allowed or disallowed may be reconsidered for "cause" and, if reconsidered, may be allowed or disallowed "according to the equities of the case." It is well-established that bankruptcy courts have wide discretion in determining what constitutes adequate "cause" for reconsideration of claims. *In re Zieder*, 263 B.R. 114, 117 (Bankr. D. Ariz. 2001).

The parties have submitted extensive briefing on the issue of the proper standard for making this determination. As stated above, 11 U.S.C. § 502(j) merely provides that a claim may be reconsidered for cause. The FCC argues that the Movants' motion is governed by Fed. R. Civ. P. 60(b), which is made applicable to bankruptcy proceedings by Fed. R. Bankr. P. 9024. As the term "cause" as used in 11 U.S.C. § 502(j) is not defined in the Code, many courts have looked to Fed. R. Civ. P. 60(b) for guidance in determining whether cause exists in a particular case. *See, e.g., In re Levoy*, 182 B.R. 827, 832 (9th Cir. BAP 1995); *In re Cleanmaster Indus., Inc.*, 106 B.R. 628, 630 (9th Cir. BAP 1989).

The Movants argue that Fed. R. Civ. P. 60(b) does not apply in this case because the order allowing claims was not a final order. The Court recognizes that this case presents a somewhat unique situation that does not appear to fit squarely within the Code's procedural requirements for allowing a claim. Pursuant to 11 U.S.C. § 502(a), an order allowing claims is normally only entered if an objection to claim is filed. The objection to claim is a contested matter, resulting in a final order when the order allowing claims is entered. *See* Fed. R. Bankr. P. 9014; *Mohamed Poona v. Alleghany Props. (In re Los Gatos Lodge, Inc.)*, 278 F.3d 890, 894 (9th Cir. 2002). In this case, an objection to claim was not filed. Rather, the Trustee sought and obtained an order allowing the FCC claim in an uncontested situation. Therefore, this claim and the procedure for reconsidering it do not present the typical scenario.

Despite the irregularities in obtaining the order allowing claims, it is unnecessary for this Court to determine whether application of Fed. R. Civ. P. 60(b) is mandatory, or merely instructive. This Court concludes that "cause" exists to reconsider the FCC's claim no matter which standard is applied.

Assuming that Fed. R. Civ. P. 60(b) is applicable to this determination, the Movants argue that cause exists to reconsider the FCC's claim under either. Fed. R. Civ. P. 60(b)(1), (5) or (6). This Court agrees. The Court concludes that the Movants are entitled to relief under either Fed. R. Civ. P. 60(b)(5) or (6). Pursuant to Fed. R. Civ. P. 60(b)(5), a court may relieve a party from a final order if "the judgment

has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application[.]" According to Fed. R. Civ. P. 60(b)(6), a court may also relieve a party for "any other reason justifying relief from the operation of the judgment."

Relief is warranted under either of these sections based on the fact that the FCC's claim against the Debtor's estate for $48,187,219.73 has been satisfied. The Court is unconvinced by the FCC's argument that the claim may not be reconsidered because the licenses that it subsequently auctioned were different licenses than the ones previous held by the Debtor. The FCC relies on the fact that the Debtor's licenses were allegedly cancelled, the fact that the FCC is prohibited from reauctioning licenses under 47 U.S.C. § 309(j), and the fact that the new licenses had different terms and different spectrum bandwidth configurations. No matter how labeled, however, the FCC could not have auctioned these licenses to new users, but for the Debtor's default.

At the hearing, the FCC admitted that it has a duty to mitigate damages in default situations. Subsequent to the hearing, the FCC submitted a supplemental brief, presumably to clarify its position regarding "mitigation". In its supplemental brief, the FCC makes a distinction between formal "mitigation" and "equitable debt forgiveness". According to the FCC, formal mitigation is only required of the FCC in pre-licensing default situations, not after a license has been granted. In post-licensing default situations, the FCC takes the

position that, even though the formal mitigation rule of 47 C.F.R. § 12104(g)(2) does not apply, it will use its authority to compromise the debt in order to avoid any inequitable double recovery *See Leonard J. Kennedy, Esq. and Richard S. Denning, Esq.*, 11 F.C.C.R. 21,572 (1996) ("Kennard-Farquhar letter").

The Court recognizes that the distinction between formal "mitigation" and "equitable debtor forgiveness", if any, maybe relevant to the issue of whether the estate has any remaining claims against the FCC. This issue, however, is not presently before the Court. The only issues before this Court are whether to reconsider the FCC's claim and whether to approve the stipulation. On this issue, the FCC's supplemental brief supports reconsideration of the FCC's claim. In the Kennard-Farquhar letter, the FCC clearly recognizes the inequity of allowing the FCC to collect from a debtor twice upc.. default. In this published decision letter, the FCC stated that its position in a case would be to "forgive any outstanding debt so long as it has been made whole (penalties and costs included) in a subsequent auction." 11 F.C.C.R. at 21576. The FCC also recognized that its remedies are limited to those permitted by applicable law. "If certain remedies are not enforceable or not otherwise permitted by applicable law, the Commission, or course, will not pursue them." 11 F.C.C.R. at 21576. It is unclear whether such a double recovery would ever be requested by the FCC in a non-bankruptcy situation. Accordingly, it can be argued that it is inequitable to only request this double recovery in a bankruptcy context.

Assuming that the federal debt collection regulations apply, which is contested by the FCC, the proceeds from a reauction of defaulted licenses would be applied to the outstanding debt. According to 47 C.F.R. 1.2110(g)(4)(iv), if any entity fails to make a required installment payment within the applicable grace period, "it shall be in default, its license shall automatically cancel, and it will be subject to debt collection procedures? 47 C.F.R. § 1.2110(g)(4)(iv) (2003). To the extent a debt-collection circumstance is not specifically covered by the FCC regulations, the agency is to proceed in accordance with the Federal Claims Collection Standards. 47 C.F.R. § 1.1904(b) (2003). The Federal Claims Collection Standards for "Liquidation of Collateral" provide that the proceeds from the liquidation of collateral shall be applied to the debts due. See 4 C.F.R. § 102.10 (1999) (current version at 31 C.F.R. § 901.7(a)(effective December 22, 2000)). The Kennard-Farquhar letter is in conformity with these regulations, at least in that it also recognizes that equity principles dictate that proceeds from a reauction of licenses by the FCC would be used to satisfy the outstanding debt.[1]

Although the FCC disputes that it received a $238 million surplus from the subsequent auction of the licenses, the FCC has conceded that the proceeds from the subsequent auction exceed the amount of its

---

[1] Based on the Court's limited decision, it is unnecessary at this time to consider the application, if any of 11 U.S.C. § 525 or *FCC v. NextWave Pers. Communications, Inc.*, 537 U.S. 293, 123 S. Ct. 832 (2003).

claim against the Debtor's estate. If the Court were to accept the FCC's argument, the FCC would unquestionably receive a substantial windfall. Such a result would be contrary to the FCC's position as stated in tile' Kennard-Farquhar letter that it would "forgive outstanding debt so long as it has been made whole (penalties and costs included) in a subsequent auction." 11 F.C.C.R. at 21576. Prevention of such a double recovery to the Debtor's creditors and estate, particularly where the claimant has recognized in its own policy statements that such a result would be inequitable, is precisely the type of circumstance that Fed. R. Civ. P. 60(b)(5) or (6) should be utilized to prevent.

As the Court concludes that cause exists to grant the Movants relief under either Fed. R. Civ. P. 60(b)(5) or (6) it is unnecessary for this Court reach the issue of whether relief is also warranted under Fed. R. Civ. P. 60(b)(1).

The Court recognizes that the partes have included briefing on issues that are not necessarily before the Court at this time. For example, the Movants are taking the position that the estate also has substantial claims against the FCC for the $238 million surplus. The Court simply concludes that the FCC is not entitled to any further claim against the estate for the $48,187,219.73.

Based on the above, the Court concludes that the Movants have established cause to reconsider the FCC's claim against the Debtor's estate. Accordingly, the motion for reconsideration of the

FCC's claim is granted. The Trustee's motion to approve the stipulation with the FCC is denied.

DATED: September 2, 2003

/s/
Paul B. Snyder
U.S. Bankruptcy Judge

CERTIFICATE OF MAILING: I CERTIFY I MAILED COPIES OF THE FOREGOING TO: Brendan Collins, William Beecher, Marjorie Raleigh, James Day Donald Verrilli, Joseph Campos, Christopher Kent

DATED: September 2, 2003

BY: /s/

APPENDIX E

Statutes and Regulations Involved

11 U.S.C. § 362

§ 362. Automatic stay

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970, operates as a stay, applicable to all entities, of-

* * *

(4) any act to create, perfect, or enforce any lien against property of the estate;

(5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;

* * *

(b) The filing of a petition under section 301, 302, or 303 of this title, or of an application under section 5(a)(3) of the Securities Investor Protection Act of 1970, does not operate as a stay--

* * *

(4) under paragraph (1), (2), (3), or (6) of subsection (a) of this section, of the commencement or continuation of an action or proceeding by a governmental unit or any organization exercising authority under the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, opened

for signature on January 13, 1993, to enforce such governmental unit's or organization's police and regulatory power, including the enforcement of a judgment other than a money judgment, obtained in an action or proceeding by the governmental unit to enforce such governmental unit's or organization's police or regulatory power;

* * *

(d) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay--

(1) for cause, including the lack of adequate protection of an interest in property of such party in interest;

(2) with respect to a stay of an act against property under subsection (a) of this section, if--

(A) the debtor does not have an equity in such property; and

(B) such property is not necessary to an effective reorganization;

* * *

47 U.S.C. § 309(j)

§ 309. Application for license

* * *

(j) Use of competitive bidding

(1) General authority

If, consistent with the obligations described in paragraph (6)(E), mutually exclusive applications are accepted for any initial license or construction permit, then, except as provided in paragraph (2), the Commission shall grant the license or permit to a qualified applicant through a system of competitive bidding that meets the requirements of this subsection.

* * *

(3) Design of systems of competitive bidding

For each class of licenses or permits that the Commission grants through the use of a competitive bidding system, the Commission shall, by regulation, establish a competitive bidding methodology. The Commission shall seek to design and test multiple alternative methodologies under appropriate circumstances. The Commission shall, directly or by contract, provide for the design and conduct (for purposes of testing) of competitive bidding using a contingent combinatorial bidding system that permits prospective bidders to bid on combinations or groups of licenses in a single bid and to enter multiple alternative bids within a single bidding round. In identifying classes of licenses and permits to be issued by competitive bidding, in specifying eligibility and other characteristics of such licenses and permits, and in designing the methodologies for use under this subsection, the Commission shall include safeguards to protect the public interest in the use of the spectrum and shall seek to promote the purposes specified in section 151 of this title and the following objectives:

* * *

(B) promoting economic opportunity and competition and ensuring that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women;

* * *

(4) Contents of regulations

In prescribing regulations pursuant to paragraph (3), the Commission shall--

(A) consider alternative payment schedules and methods of calculation, including lump sums or guaranteed installment payments, with or without royalty payments, or other schedules or methods that promote the objectives described in paragraph (3)(B), and combinations of such schedules and methods;

* * *

U.C.C. § 9-602 (Wash. Rev. Code § 62A.9A-602)

62A.9A-602. Waiver and variance of rights and duties

Except as otherwise provided in RCW 62A.9A-624, to the extent that they give rights to an obligor (other than a secondary obligor) or a debtor and impose duties on a secured party, the debtor or obligor may not waive or vary the rules stated in the following listed sections:

* * *

(5) RCW 62A.9A-608(a) and 62A.9A-615(d) to the extent that they require accounting for or payment of surplus proceeds of collateral;

* * *

U.C.C. § 9-610 (Wash. Rev. Code 62A.9A-610)

62A.9A-610. Disposition of collateral after default

(a) Disposition after default. After default, a secured party may sell, lease, license, or otherwise dispose of any or all of the collateral in its present condition or following any commercially reasonable preparation or processing.

* * *

U.C.C. § 9-615 (Wash. Rev. Code 62A.9A-615)

62A.9A-615. Application of proceeds of disposition; liability for deficiency and right to surplus

(a) Application of proceeds. A secured party shall apply or pay over for application the cash proceeds of disposition under RCW 62A.9A-610 in the following order to:

(1) The reasonable expenses of retaking, holding, preparing for disposition, processing, and disposing, and, to the extent provided for by agreement and not prohibited by law, reasonable attorneys' fees and legal expenses incurred by the secured party;

(2) The satisfaction of obligations secured by the security interest or agricultural lien under which the disposition is made;

(3) The satisfaction of obligations secured by any subordinate security interest in or other subordinate lien on the collateral if:

(A) The secured party receives from the holder of the subordinate security interest or other lien an authenticated demand for proceeds before distribution of the proceeds is completed; and

(B) In a case in which a consignor has an interest in the collateral, the subordinate security interest or other lien is senior to the interest of the consignor; and

(4) A secured party that is a consignor of the collateral if the secured party receives from the consignor an authenticated demand for proceeds before distribution of the proceeds is completed.

* * *

(d) Surplus or deficiency if obligation secured. If the security interest under which a disposition is made secures payment or performance of an obligation, after making the payments and applications required by subsection (a) of this section and permitted by subsection (c) of this section:

(1) Unless subsection (a)(4) of this section requires the secured party to apply or pay over cash proceeds to a consignor, the secured party shall account to and pay a debtor for any surplus; and

(2) The obligor is liable for any deficiency.

* * *

47 CFR § 1.2110(g)(4)(iv)

§ 1.2110 Designated entities

* * *

(g) Installment payments. The Commission may permit small businesses (including small businesses owned by women, minorities, or rural telephone companies that qualify as small businesses) and other entities determined to be eligible on a service-specific basis, which are high bidders for licenses specified by the Commission, to pay the full amount of their high bids in installments over the term of their licenses pursuant to the following:

* * *

(3) Upon grant of the license, the Commission will notify each eligible licensee of the terms of its installment payment plan and that it must execute a promissory note and security agreement as a condition of the installment payment plan. Unless other terms are specified in the rules of particular services, such plans will:

(i) Impose interest based on the rate of U.S. Treasury obligations (with maturities closest to the duration of the license term) at the time of licensing;

(ii) Allow installment payments for the full license term;

(iii) Begin with interest-only payments for the first two years; and

(iv) Amortize principal and interest over the remaining term of the license.

(4) A license granted to an eligible entity that elects installment payments shall be conditioned upon the full and timely performance of the licensee's payment obligations under the installment plan.

(i) Any licensee that fails to submit its quarterly payment on an installment payment obligation (the "Required Installment Payment") may submit such payment on or before the last day of the next quarter (the "first additional quarter") without being considered delinquent. Any licensee making its Required Installment Payment during this period (the "first additional quarter grace period") will be assessed a late payment fee equal to five percent (5%) of the amount of the past due Required Installment Payment. The late payment fee applies to the total Required Installment Payment regardless of whether the licensee submitted a portion of its Required Installment Payment in a timely manner.

(ii) If any licensee fails to make the Required Installment Payment on or before the last day of the first additional quarter set forth in paragraph (g)(4)(i) of this section, the licensee may submit its Required Installment Payment on or before the last day of the next quarter (the "second additional quarter"), except that no such additional time will be provided for the July 31, 1998 suspension interest and installment payments from C or F block licensees that are not made within 90 days of the payment resumption date for those licensees, as explained in Amendment of the Commission's Rules Regarding Installment Payment

Financing for Personal Communications Services (PCS) Licensees, Order on Reconsideration of the Second Report and Order, WT Docket No. 97-82, 13 FCC Rcd 8345 (1998). Any licensee making the Required Installment Payment during the second additional quarter (the "second additional quarter grace period") will be assessed a late payment fee equal to ten percent (10%) of the amount of the past due Required Installment Payment. Licensees shall not be required to submit any form of request in order to take advantage of the first and second additional quarter grace periods.

(iii) All licensees that avail themselves of these grace periods must pay the associated late payment fee(s) and the Required Installment Payment prior to the conclusion of the applicable additional quarter grace period(s). Payments made at the close of any grace period(s) will first be applied to satisfy any lender advances as required under each licensee's "Note and Security Agreement," with the remainder of such payments applied in the following order: late payment fees, interest charges, installment payments for the most back-due quarterly installment payment.

(iv) If an eligible entity obligated to make installment payments fails to pay the total Required Installment Payment, interest and any late payment fees associated with the Required Installment Payment within two quarters (6 months) of the Required Installment Payment due date, it shall be in default, its license shall automatically cancel, and it will be subject to debt collection procedures. A licensee in the PCS C or F blocks shall

be in default, its license shall automatically cancel, and it will be subject to debt collection procedures, if the payment due on the payment resumption date, referenced in paragraph (g)(4)(ii) of this section, is more than ninety (90) days delinquent.

* * *

APPENDIX F

SECURITY AGREEMENT

(Broadband Personal Communications Service C Block: Auction Event No. 5, 10)
License No. PBB008C

This SECURITY AGREEMENT DATED November 1, 1996, ("Agreement") between Magnacom Wireless, a Limited Liability Company ("Debtor"), and the FEDERAL COMMUNICATIONS COMMISSION, an independent regulatory agency of the United States ("Commission" or "Secured Party")

WITNESSETH

WHEREAS, Debtor has submitted the highest accepted bid for license number PBB008C in the Broadband Personal Communications Service C Block auction (hereinafter the "License") conducted by the Commission to assign such licenses;

WHEREAS, the Commission has duly determined to grant the License to Debtor, subject to the terms and conditions set forth in the orders and regulations of the Commission applicable to such licenses, and the Communications Act of 1934, as amended;

WHEREAS, Debtor wishes to pay its auction price for the License by installments through an Installment Payment Plan as provided by 47 C.F.R. §§ 24.711; 1.2110 (hereinafter the "Installment Payment Plan") and undertakes to hold the License under the terms and conditions set forth in the Commission's orders and regulations, as amended, applicable to such licenses, and the Communications

Act of 1934, as amended and the terms and conditions of this Agreement;

WHEREAS, the Commission has agreed to permit the Debtor to make payment of the auction once for the License through an Installment Payment Plan; and

WHEREAS, as a condition to such agreement, Debtor has agreed to execute the Installment Payment Plan Note of even date ("Note"). and to enter into this Agreement and make the pledge and assignment of collateral contemplated herein.

NOW, THEREFORE, in consideration of the premises, the mutual agreements contained herein and for other good and valuable consideration, the receipt, adequacy, and sufficiency of which is hereby acknowledged, and in order to induce the Commission to permit Debtor to pay the auction price for the License through the Installment Payment Plan, Debtor hereby agrees with the Commission as follows:

1. **Pledge and Assignment of Collateral for Obligations Under Note**. Debtor hereby pledges, assigns, hypothecates, delivers, and sets over to the Commission and grants to the Commission a first lien on and continuing security interest in all of the Debtor's rights and interest in the License and all proceeds, profits and products of any sale of or other disposition thereof (collectively the "Collateral"), all as collateral security for the prompt and complete payment when due (whether in accordance with the schedule of payments, at the stated maturity, by acceleration, or otherwise) of the unpaid principal

and interest due, and such other additional costs, expenses, late charges, administrative charges, attorneys fees, and default payments assessable under the terms of the Note (all collectively "Obligation"). It is expressly understood by Debtor that all of the terms of the Note apply to this Agreement and that reference herein to "this Agreement" includes both the Security Agreement herein and the Note. For purposes of interpreting the terms used in this Agreement shall have the meaning ascribed to them in the Uniform Commercial Code (Official Text and Comments, American Law Institute).

2. **Interest of Commission.** It is understood and acknowledged by Debtor that pursuant to Section 301 of the Communications Act of 1934, as amended, the Commission is charged with the regulatory mandate to maintain control over all channels of radio transmission (the Spectrum"), and to provide licenses for the use of such radio channels, but not ownership thereof. Debtor understands and acknowledges that it holds a mere conditional license to use the Spectrum with no ownership interest. in the Collateral (or any underlying right to use the Spectrum), or any power to assign the License without the prior approval of the Commission pursuant to Section 3 10(d) of the Communications Act of 1934, as amended. Debtor further understands and acknowledges that it is giving a security interest to the Commission in the Collateral only to assist the Commission in protecting its ability to enforce the Commission's regulations which condition holding the license in compliance with all

then-applicable orders and regulations of the Commission, including, but not limited to, full and timely payment of all payments under the Installment Payment Plan. To that end, and not in derogation of any of the Commission's regulatory authority over the License, Debtor hereby acknowledges that the Commission has a first security interest in the Collateral, and Debtor shall not dispute such first security interest, or the Commission's rights as a secured party hereunder, in any legal or equitable proceeding in which Debtor, or any assignee or trustee of the estate of Debtor in bankruptcy, is a party. Nothing set forth herein shall preclude the Debtor from granting to other parties a subordinated security interest limited to a subordinated interest in the proceeds. arising from an authorized assignment or transfer of the License to a third party (hereinafter a "Subordinated Security Interest"), provided however that any such Subordinated Security Interest shall be subordinated to and in no way inconsistent with the Commission's first security interest in the Collateral, including but not limited to the proceeds of any disposition of the License, and further provided that said Subordinated Security Interest shall not survive if the License is rescinded, cancelled, or revoked by regulatory action of the Commission for violation of the terms and conditions of the License, including but not limited to regulatory action upon a default under this Agreement pursuant to 47 C.F.R. § 1.2110. The Debtor shall provide to the Commission upon request the name and address of any party with a Subordinated Security Interest in the proceeds of

any disposition of the License, and a copy of any documents setting forth such a Subordinated Security Interest.

3. **Compliance with Commission Orders and Regulation.** Nothing in this Agreement shall be deemed to modify any then-applicable orders and regulations of the Commission. and nothing in this Agreement shall be deemed to release Debtor from compliance therewith.

4. **Representations and Warranties of Debtor.** Debtor represents and warrants to the Commission as follows:

(a) It has full power, authority and legal right to execute, deliver and perform this Agreement, the Note, and any other documents delivered in connection with the Note, this Agreement and the transactions contemplated therein, to make the debt transaction evidenced by the Note, and to pledge the Collateral pursuant to this Agreement.

(b) It is a duly organized limited liability company, existing in good standing under the laws of Delaware and is duly qualified to do business wherever necessary to carry on its present operations. Its principal place of business and chief executive office are located at _____.

(c) The representative of Debtor purporting to act on behalf of Debtor in executing this Agreement, the Note, and any other documents delivered in connection with the Note, this Agreement and the transactions contemplated therein, is duly

authorized by Debtor to take all such acts and to execute all such documents.

(d) No security agreements have been executed and delivered, and no financing statements have been filed in any jurisdiction; granting or purporting to grant a security interest in the Collateral that would give any other person any right or interest in the Collateral, or any portion thereof, except for a Subordinated Security Interest, as defined herein, and that no person has an a secured interest that is or will be in any way inconsistent with the rights of the Commission herein as the first secured party or the terms of this Agreement.

(e) No consent of any other party and no consent, license, approval or authorization of, exemption by, or registration or declaration with, any governmental instrumentality, domestic or foreign other than the Commission, is required to be obtained in connection with the execution, delivery or performance of this Agreement, The Note or any other document executed and delivered in connection with the delivery of the Note or this Agreement.

(f) The execution, delivery and performance of this Agreement and the Note does not and will not violate any provision of any applicable law or regulation or any order, judgment, writ, award or decree of any court, arbitrator, governmental instrumentality, domestic or foreign, or of any indenture, contract, agreement or other undertaking to which Debtor is a party or which purports to be binding upon Debtor or. upon any of Debtor's assets, and will not result in the creation or imposition of

any lien, charge or encumbrance on or security interest in any of the assets of Debtor, except as contemplated by this Agreement.

(g) Debtor will not permit any financing statement to be filed with respect to the Collateral or any portion thereof or interest therein that would give said any other person a right or any interest in the Collateral, or any portion thereof, except that Debtor may permit a third party to file a Subordinated Security Interest, as defined herein, so long as said Subordinated Security Interest, is not in any way inconsistent with the terms of this Agreement and the rights of the Commission herein as the first secured party. Debtor will promptly notify Secured Party of, and will defend the Collateral against, all claims and demands of all persons at any time claiming the same or any interest therein that would give any other person a right or any interest in the Collateral not subordinated to the rights of the Commission herein as the first secured party, or that is in any way inconsistent with the terms of this Agreement.

5. **Covenants of Debtor**. Debtor hereby covenants and agrees as follows:

(a) That it will defend the Commission's right, title and security interest in and to the Collateral against the claims and demands of all persons whomsoever.

(b) That it will execute all financing statements and other instruments or documents related to the perfection of the Commission's security interest, including but not to any

renewal financing statements or instruments as required to maintain the Commission's security interest, or as otherwise reasonably requested by the Commission, and to file and pay the cost of filing any such instruments or documents as required under this paragraph in whichever public office deemed advisable by the Commission.

(c) That it will not make any indenture, contract, agreement or other undertaking to which Debtor is a party or which purports to be binding upon Debtor, or upon any of Debtor's assets, that would result in the creation or imposition of any lien, charge or encumbrance on or security interest in any of the assets of Debtor that would give any other person a right or any interest in the Collateral, or any portion thereof, except for a Subordinated Security Interest, as defined herein, provided that such Subordinated Security Agreement is not inconsistent with the terms of this Agreement and interest of the Commission as the first secured party.

(d) That it will pay all costs and expenses, including reasonable attorneys' fees, of the Commission incurred in connection with the enforcement of this Agreement and any and all liability incurred by the Commission resulting from any act or omission of Debtor with respect to the Collateral and this Agreement.

(e) Debtor will execute, alone or with Secured Party, any document, will procure any document and do all other acts and pay all

connected costs, in a timely and proper manner, which from the character or use of the Collateral may be reasonably necessary to protect the Collateral against the rights, claims or interests of third persons, and will otherwise preserve the Collateral as security hereunder, The specific undertakings required of Debtor in this Agreement shall not be consumed to exclude the aforementioned general obligation.

6. **Power of Attorney**. Debtor hereby irrevocably constitutes and appoints the Commission and any officer or agent thereof, with full power of substitution, as its true and lawful attorney-in-fact with full irrevocable power and authority in the place and stead of Debtor and in the name of Debtor or in its own name, from time to time in the Commission's discretion, for the purpose of carrying out the terms of this Agreement and, to the extent permitted by applicable law, to take any and all appropriate actions and to execute any and all documents and instruments which may be necessary or desirable to accomplish the purposes of this Agreement. Such appointment is a power coupled with an interest until all Obligations have been paid in full by Debtor.

7. **Event of Default**. Debtor shall be in default under this Agreement if an Event of Default (as defined in the Note) has occurred.

8. **Remedies**. If an Event of Default shall occur, the Commission shall thereafter have the following rights and remedies (to the extent permitted by applicable law) in addition to the rights and remedies relating to the Note, all such remedies

being cumulative, not exclusive, and enforceable alternatively, successively or concurrently at such time or times as Commission deems expedient:

(a) the License shall be automatically canceled pursuant to 47 C.F.R. § 1.2110;

(b) all Obligations secured hereunder shall become immediately due and payable without presentment, demand, protest, further notice, or other requirements of any kind;

(c) the Commission may demand, sue for, and collect the outstanding balance of the unpaid Obligations, and make any compromise, or settlement the Commission deems suitable with respect to any Collateral which may be held by it hereunder;

(d) Debtor hereby acknowledges the Commission's authority, pursuant to Communications Act of 1934, as amended, and the Commission's orders and regulations then-applicable to such licenses, to conduct another public auction or assign the License in the event that the Commission rescinds, cancels, or revokes the License for any default under this Agreement or violation of the terms and conditions of the License. The Undersigned hereby waives all notices prior to the conduct of said public auction or assignment by the Commission or its agents. Debtor further acknowledges that in the event that the Commission rescinds, cancels, revokes the License for any default under this Agreement or any other violation of the terms and conditions of the License, Debtor has no right or interest in

any moneys or evidence of indebtedness given to the Commission by a subsequent licensee of the Spectrum and that all such moneys or evidence of indebtedness, are, and shall remain, the full property of the federal Treasury, pursuant to Section 309(j) of the Communications Act of 1934, as amended, and then-applicable. Commission orders and regulations.

(e) In addition to other remedies hereunder, Debtor shall remain liable, and obligated to pay on demand, all costs of collection and reasonable attorneys' fees and expenses incurred or paid by the Commission in enforcing this Agreement including, without limitation, all administrative fees and expenses of the Commission in attempting to collect the Obligations or to enforce this Agreement, or the prosecution Or defense of any action or proceeding related to the subject matter of this Agreement, and all payments assessed by the Commission in the event of default as specified in Commission orders and regulations applicable to such licenses.

(f) Debtor hereby acknowledges that the Commission has no adequate remedy at law with respect to a breach of any covenant contained in this Agreement and, as a consequence, agrees that each and every covenant contained in this Agreement shall be specifically enforceable against Debtor, and Debtor hereby waives and agrees not to assert any defense against an action for specific performance of such covenants.

(g) Secured Party may exercise any and all of the rights and remedies conferred upon Secured Party by this Agreement, any other loan documents, or by applicable law, either concurrently or in such order as Secured Party may determine.

(h) Secured Party may make such payments and do such acts as Secured Party may deem necessary to protect its security interest in the Collateral.

(i) the Commission may exercise any remedies of a Secured Party under the Uniform Commercial Code (Official Text and Comments, American Law Institute), or any other applicable law.

(j) Secured Party shall have the right to enforce one or more remedies hereunder or under the Now, successively or concurrently, and such action shall not operate to estop or prevent Secured Party from pursuing any further remedy which it may have.

9. **Severability**. Any provision of this Agreement that is prohibited or unenforceable in any jurisdiction shall, as to such jurisdiction, be ineffective to the extent of such prohibition or unenforceability without invalidating the remaining provisions hereof, and any such prohibition or unenforceability in any jurisdiction shall not invalidate or render unenforceable such provision in any other jurisdiction.

10. **No Waiver; Cumulative Remedies**. None of the terms or provisions of this Agreement may be waived, altered, modified or amended except by an installment in writing, duly executed by the Commission. The Commission shall not by any act, delay, omission or otherwise be deemed to have waived any of its rights or remedies under this Agreement, and no waiver shall be valid unless in writing, signed by the Commission, and then only to the extent therein set forth. A waiver by the Commission of any right or remedy under this Agreement on any one occasion shall not be construed as a bar to any right or remedy which the Commission would otherwise have on any future occasion. No failure to exercise nor any delay in exercising on the part of the Commission, any right, power or privilege under this Agreement shall operate as a waiver thereof; nor shall any single or partial exercise of any right, power or privilege under this Agreement preclude any other or further exercise thereof or the exercise of any other right power or privilege. The rights and remedies provided in this Agreement are cumulative and may be exercised singly or concurrently and are not exclusive of any rights or remedies provided by law.

11. **Compliance With Other Applicable Orders an Regulations**. Debtor recognizes that its continued retention of the License, and rights to operate as a Commission licensee thereunder, are conditioned upon compliance with all Commission orders and regulations applicable to the License and the Communications Act of 1934, as amended. Debtor further recognizes that full and timely payment as

set forth in the Note does not otherwise relieve it of its obligations otherwise to comply with the then-applicable orders and regulations of the Commission, and the Communications Act of 1934, as amended.

12. **Applicable Law.** This Agreement shall be governed by and construed in accordance with Communications Act of 1934, as amended, then-applicable Commission orders and regulations, as amended, and federal law.

13. **Successors. Assigns. Designated Agent.** Subject to the provisions of Section 2 of this Agreement regarding the restriction upon Debtor's ability to assign the License, this Agreement shall be binding upon Debtor, its successors and assigns and shall inure to the benefit of the Commission, and its successors and assigns. The Commission may designate agents other than the Commission to act on its behalf with respect to any and all rights and remedies of the Commission under this Agreement or the Note, and such designee shall have all of the rights, powers and remedies available to the Commission within the scope of its designation. Nothing herein, however, shall be construed as granting Debtor any right to sell or assign the License.

14. **Singular and Plural.** Wherever used, the singular number shall include the plural, the plural shall include the singular, and the use of any gender shall be applicable to all genders.

15. **Financing Statements.** To the extent permitted by applicable law, Debtor authorizes the Commission to sign and file financing statements at

any time with respect to any of the Collateral without the signature of Debtor. Debtor will, however, at the same time and from time to time. execute such financing statements, agreements and other instruments and perform such acts as Commission may request in order to establish and maintain a validly perfected first priority security interest in the Collateral. All reasonable costs of filing and recording will be paid by Debtor.

16. **Indemnification.** Debtor hereby agrees to defend, indemnify and hold harmless Secured Party and its employees, officers and agents, from and against any and all liabilities, claims and obligations which may be incurred,. asserted or imposed upon them or any of them as a result of or in connection with any use, operation, lease or consumption of any of the Collateral or as a result of Secured Party's seeking to obtain performance of any of the obligations due with respect to the Collateral.

17. **Notices.** All notices; requests and demands hereunder shall be in writing and shall, be deemed to have been duly given, made or served on the earliest of (I) three (3) business days after the date mailed if sent by first-class U.S. mail, postage prepaid, (ii) actual delivery thereof if delivered by hand to the party to be notified, (iii) receipt thereof if sent by express mail or other overnight courier service, or (iv) transmission to the telecopier number listed below for the party to be notified if sent within normal business hours or, otherwise, on the next business day thereafter. In each case such notification with respect to the Debtor and the Commission shall be addressed as set forth below or

as may be hereafter designed by the respective parties hereto.

As to Debtor: Matt Wetzel - General Manager
4317 NE Thurston Way
Vancouver, WA 98662

As to the Commission: U.S. Department of Treasury
P.O. Box 44093
Washington, D.C. 20026-4093
ATTN: FCC-FMS/DEBT
Management Service

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be duly executed and delivered as of the day and year first above written.

DEBTOR:

Date: 6/6/97 By: Magnacom Wireless

Its: /s/

FEDERAL COMMUNICATIONS COMMISSION: By: /s/

Date: 7/7/97 Its: Associate Managing Director for Operations (or Designee)